Supreme Court, U.S.
FILED

160 (1) 091342 APR 28 2010

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

JERI-ANN SHERRY,
Petitioner,

v.

WILLIAM D. JOHNSON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a State trial court, the counsel for William Johnson agreed to close the courtroom for the testimony of three witnesses who were afraid because two other witnesses had been murdered during the pendency of the case. The Michigan courts concluded that there was no ineffective assistance of counsel for agreeing to the closure of the courtroom. The U.S. Court of Appeals for the Sixth Circuit determined that counsel may have been ineffective and that any prejudice should be presumed if the State trial court would not have closed the courtroom but for the agreement of counsel. The question presented is as follows:

> Where there is a conflict of circuits on whether a criminal defendant must prove actual prejudice for ineffective assistance that relates to a structural error, did the Michigan courts unreasonably apply clearly established Supreme Court precedent under 28 U.S.C. § 2254(d) in rejecting the claim of ineffective assistance of counsel because it did not affect the outcome?

PARTIES TO THE PROCEEDING

Petitioner is Jeri Ann Sherry, Warden of a Michigan Correctional Facility. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. The petition will refer to Petitioner as the State of Michigan.

Respondent is William Johnson, an inmate in the Michigan Department of Corrections. Respondent was the petitioner-appellant in the Sixth Circuit.

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The decision of the Sixth Circuit, *Johnson v. Sherry*, reversing the district court's denial of habeas corpus relief is reported at 586 F.3d 439 (6th Cir. 2009). Pet. App. 2a-24a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 1a. The district court decision is also unpublished. Pet. App. 25a-66a.

For the State court decisions, the decision of the Michigan Court of Appeals in *People v. Johnson* is unpublished. Pet. App. 67a-91a. The Michigan Supreme Court denied leave in an unpublished decision.

JURISDICTION

On January 28, 2010, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that the State asked the Sixth Circuit to rehear was entered on November 13, 2009. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit determined that the performance of Johnson's counsel may be deficient for agreeing to the closure of the courtroom for three of the eighteen witnesses who testified at trial. The Sixth Amendment provi 'es an accused the right to a public trial and the right "to have the assistance of counsel for his defense" in all criminal prosecutions.

Regarding the relevant statutory provisions, the prisoner challenged the basis of his confinement under

28 U.S.C. § 2254(e)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With regard to factual determinations by the State court under 28 U.S.C. § 2254(e)(1), the federal courts must accord a presumption of correctness unless rebutted by clear and convincing evidence:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

William Johnson was convicted in State court in Michigan following a jury trial in 2003 of second-degree murder and three counts of assault with intent to murder. During the course of the trial, the prosecution moved to close the courtroom because three of its witnesses were fearful of reprisals. During the pendency of the case, two eyewitnesses to the crime had been murdered. Before ruling on the motion to close the courtroom for these fearful witnesses, the counsel for Johnson acquiesced to the motion and later asked persons from Johnson's family to remain outside the courtroom for their testimony. The Sixth Circuit determined that this consent to close the courtroom may have been deficient performance – remanding to the district court on that issue – and that it would presume prejudice if the federal district court concludes on remand that the State trial court would not have closed the courtroom in the absence of consent.

1. The Crime

On March 3, 2002, Carlos Davis was shot and killed outside of a dance hall in Hamtramck, Michigan, a city enclosed within the City of Detroit. Pet. App. 67a. There were three other assault victims – Robert Richards, James Mathis, and Larry Lewis. Pet. App. 67a. Mathis was shot in the face, Trial, January 7, 2003, Vol. II, p. 13, and Lewis was shot in the stomach, Vol. II, p. 52. The shooting occurred after a brawl had broken out among persons who attended a party at the dance hall that night. Pet. App. 67a.

Only two witnesses reported to seeing the shooter. Richards told the police that he saw the shooter and gave the police a detailed description of his clothing. Pet. App. 68a. From photographs that the police obtained from his description, Richards then identified Johnson as the shooter. Pet. App. 68a. Richards identified Johnson at the preliminary examination, but was murdered after the preliminary examination and so his transcript was read at trial. Pet. App. 68a.

The other witness, Damon Ramsuer, signed a statement that he saw the shooter, identifying Johnson from the photographs taken from the party. Pet. App. 68a. Ramsuer failed to appear for Johnson's preliminary examination. At trial, Ramsuer denied seeing the shooter, denied informing the police that he saw the shooter, and denied making any identification. Pet. App. 68a. He was impeached with his signed statement at trial. Pet. App. 68a.

The jury convicted Johnson of second-degree murder and three counts of assault with intent to murder.

2. The Closing of the Courtroom

On the first day of trial, the prosecution moved to close the courtroom for the testimony of Mathis, Lewis, and Ramsuer. Pet. App. 68a. The prosecution explained that two other witnesses, Elvin Robinson, an eyewitness from the scene of the shooting, and Robert Richards had been murdered during the pendency of the case. The prosecution explained the justification:

> [Mr. Robinson] was murdered in his car outside of a bar prior to his testimony of the preliminary exam. So he's one witness who was murdered.
>
> We have a second witness [Robert Richards] who was murdered in his bed after he testified. So there are two witnesses who were killed under very suspicious circumstances. [Trial, January 6, 2003, Vol. I, pp. 135-136.]

The prosecution explained the exceptional nature of the request:

> [T]he level of paranoia from the witnesses is not unfounded. To have two witnesses murdered prior to testifying or after testifying is unprecedented in my experience.
>
> And the witnesses are literally terrified. One witness we transported out of state. We set up a residence out of state.
>
> There are witnesses who are cowering, refusing to come to court, even under threat of being arrested, because they are afraid for their lives.
>
> So I would ask as a precautionary measure, just for a couple of civilian witnesses[.] [Vol. I, p. 137.]

In response to the request, the State trial court had initially stated that the prosecution was "treading on some very dangerous ground" in seeking to close the courtroom for the three witnesses. Vol. I, p. 135. After the factual presentation by the prosecution, the counsel for Johnson noted that he had spoken to Johnson and did not oppose the closure as long as the jury was not tipped off to the fact:

> Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since Mr. Moran [State trial prosecutor] brought it to my attention.
>
> If the Court wants to do that, we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem. [Vol. I, p. 138.]

The State trial court thereby agreed to this process by which it would ensure that the jury was not aware that the courtroom was closed for these three witnesses. Vol. I, pp. 138-139.

The testimony of these three witnesses occurred on the second day of trial of a three-day jury trial. The testimony of the first witness, James Mathis, began at 9:49 a.m., Vol. II, p. 6, and the testimony of the third witness, Damon Ramsuer, was completed at 11:31 a.m. on that same day, Vol. II, p. 115. Thus, the courtroom was closed for one hour and forty two minutes during

this three-day trial that continued into the morning of the fourth day.

The counsel for Johnson indicated that he had asked the people from Johnson's family to arrive around 11:00 a.m. on that day of trial and to sit outside until the testimony of the third witness was complete. Vol. II, p. 6.

3. The State Courts on Direct Review

On direct review, among his other issues, Johnson claimed that he was deprived of the right to a public trial under the Sixth Amendment and that he was deprived of his right to effective counsel by his attorney's decision to agree to closing the courtroom. The Michigan Court of Appeals rejected both claims.

Regarding the right to a public trial, the Michigan Court of Appeals noted that Johnson "expressly waived his right by assenting to the trial court's decision to close the courtroom during the three witnesses' testimony." Pet. App. 69a-70a.

Moreover, the Court of Appeals determined that the State trial court properly closed the courtroom, citing the four factors from this Court's decision in *Waller v. Georgia* regarding courtroom closure.[1] The State court rested its decision on the safety concerns for the two witnesses:

> Here, the record discloses that these four [*Waller*] requirements were satisfied. The

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[1] *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

> prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. . . . We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety. [Pet. App. 71a (citations omitted).]

Regarding the issue of ineffective assistance of counsel, the Michigan Court of Appeals determined that there was no deficient performance because the courtroom closure was "justified" under the circumstances of the case. Pet. App. 79a. The Michigan Court of Appeals also determined that this decision to acquiesce to the closure was not "outcome determinative." Pet. App. 79a-80a. The Michigan Supreme Court denied leave to appeal on the issue.

4. The Federal Courts in Habeas Corpus Review

On habeas corpus, the federal district court denied Johnson's claims that he was deprived of his right to a public trial and the right to the effective assistance of counsel. The district court determined that Johnson "waived his right to a public trial by his acquiescence, through his attorney, to the closure." Pet. App. 41a. The district court also determined that the State appellate court's application of *Waller* was reasonable. Pet. App. 42a.

On the ineffective assistance claim, like the Michigan courts, the federal district court concluded that Johnson had failed to show that the failure to object fell outside the range of competent professional assistance under the first prong of *Strickland*. Pet. App. 54a.

On appeal, over a cogently written dissent, the Sixth Circuit reversed. The Sixth Circuit acknowledged that the substantive claim of a Sixth Amendment right to a public trial was procedurally defaulted, but examined whether there was a showing of cause and prejudice to excuse this default. Pet. App. 13a. The Sixth Circuit then examined this question together with Johnson's claim of ineffective assistance of counsel.

Contrary to the State courts and the federal district court, the Sixth Circuit majority concluded that it was "far from convinced" that this was one of the rare circumstances in which a courtroom closure was justified. Pet. App. 15a. Rather, it stated that it was

"difficult to see how the failure to object to the closure could have been strategic." Pet. App. 17a. It remanded for an evidentiary hearing on that issue. Pet. App. 20a. The Sixth Circuit never addressed the fact that the Michigan Court of Appeals had determined that the closure of the courtroom was justified under *Waller*, and also failed to address the federal district's conclusion that this determination was "reasonable."

On the issue whether there was any showing of prejudice, the Sixth Circuit determined that prejudice would be presumed as long as the State trial court would have closed the courtroom over an objection if Johnson's counsel had objected. Pet. App. 17a. If the State trial court would not otherwise have closed the courtroom, the Sixth Court stated that prejudice would then be presumed because the right to a public trial was a structural guarantee. Pet. App. 17a-18a.

In dissent, Sixth Circuit Judge Kethledge reasoned that there was no ineffective assistance of counsel demonstrated by the record because there was an apparent strategic basis for Johnson's counsel to agree to the closure:

> The question before us is whether that decision was so far outside the bounds of competent representation as to amount to constitutionally ineffective assistance of counsel. I do not think the decision can possibly be seen that way. Having reviewed the trial transcript, it seems to me instead that the decision was *correct*. Johnson's counsel essentially agreed to close the courtroom during the testimony

> of three witnesses, out of a total of 18 witnesses at trial. Strategically the net effect of that closure, as Johnson now describes it, was that several of his "female relatives" did not witness the testimony of those three witnesses. In return, Johnson's counsel deflected the trial judge from a line of inquiry—as to why, exactly, these three witnesses were so terrified to testify against Johnson—that almost certainly would have reflected poorly on his client.
>
> That avoidance appears all the wiser given that it emerged at Johnson's sentencing—and perhaps could have emerged sooner, had Johnson's counsel fought the closure—that Richards was shot to death with ammunition from the same lot that Johnson used to kill Davis and wound Lewis and Mathis. The Constitution, suffice it to say, permitted this strategic choice. [Pet. App. 22a-23a (emphasis in original; paragraph break added).]

Judge Kethledge further explained that there is a conflict in the circuits on whether a habeas petitioner must make a showing of prejudice when claiming that the attorney was ineffective related to the issue of one's right to a public trial. Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant this writ of certiorari, both of which indicate that the decision of the Sixth Circuit was not based on clearly established Supreme Court precedent under 28 U.S.C. § 2254(d).

First, the Sixth Circuit determined that where the claim of ineffective assistance of counsel related to the right to a public trial – a claim that the ineffective assistance caused a structural error – that the prejudice prong of *Strickland* is presumed. The Sixth Circuit employed this same analysis to resolve Johnson's procedural default, allowing him to demonstrate cause and presume prejudice to avoid the default. This Court has not held that the prejudice prong of *Strickland* is in applicable where the alleged error relates to a defendant's right to a public trial. In fact, this Court has specifically held that a habeas petitioner must still prove actual prejudice to overcome a procedural default even if the claim of error related to a structural error. Thus, the decision of the Sixth Circuit conflicts with this Court's precedent.

Second, there is a circuit split on the issue whether a court should presume prejudice in these circumstances. The Eleventh Circuit determined that the actual-prejudice requirement from *Strickland* applies for a claim that the ineffective assistance of counsel allowed the criminal defendant's right to a public trial to be violated, while the First Circuit concluded – as here – that prejudice is presumed in that circumstance. This is a jurisprudentially significant issue and requires this Court's resolution to address the conflict.

1. There is no clearly established Supreme Court precedent that indicates a court should presume prejudice for a claim of ineffective assistance of counsel for a violation of the right to a public trial.

There are two controlling cases that frame this issue. This Court outlined the standard for evaluating whether a criminal defendant is deprived of a right to a public trial in *Waller v. Georgia*. The standard for evaluating an ineffective assistance counsel claim, however, requires proof of actual prejudice under *Strickland*. These decisions do not resolve the inquiry about whether a court should presume prejudice where a criminal defendant claims that his counsel wrongly consented to a closed courtroom.

In *Waller*, this Court noted that the right of a criminal defendant to public trial is based on the fact that on open proceeding will enable the public to see that the defendant is fairly dealt with and not unjustly condemned, and that the criminal defendant's triers will be kept attentive to their responsibility and to the importance of their functions.[2] The right to an open trial may give way to other rights or interests, such as the government's interest in inhibiting disclosure of sensitive information.[3] This Court described the circumstances in which this will occur as "rare" and

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[2] *Waller*, 467 U.S. at 46, citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). This Sixth Amendment right applies to the States through the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257 (1948). *See also Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721 (2010).

[3] *Waller*, 467 U.S. at 45.

indicated that the balancing of interests must "be struck with special care."[4]

In evaluating the particular case at issue in *Waller*, this Court identified four factors that a court should consider in determining whether the closure of the courtroom would be justified:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,
>
> [2] the closure must be no broader than necessary to protect that interest,
>
> [3] the trial court must consider reasonable alternatives to closing the proceeding, and
>
> [4] it must make findings adequate to support the closure.[5]

This Court noted that where there is a showing of a violation of this right, there would be no requirement of a showing a "specific prejudice."[6] Therefore, such an error is structural in nature.

In contrast, on the issue of the effective assistance of counsel, this Court has identified a two-

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[4] *Waller*, 467 U.S. at 46, citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984).

[5] *Waller*, 467 U.S. at 48 (paragraph breaks inserted), citing *Press-Enterprise*.

[6] *Waller*, 467 U.S. at 49.

prong standard for showing that a criminal defendant has been deprived of the effective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance *prejudiced* the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[7]

The second prong requires proof that the "result of the proceeding would have been different" but for the trial counsel's deficient performance.[8]

The Sixth Circuit majority concluded that where the courtroom closure was "unjustified or broader than necessary, prejudice would be presumed" under *Waller*. Pet. App. 17a-18a. But the majority did not address the point that this Court has not previously issued a decision on whether this presumption of prejudice should apply for a claim of ineffective assistance of counsel in these circumstances.

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[7] *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(paragraph break added; emphasis added).

[8] *Strickland*, 466 U.S. at 694.

On this point, Judge Kethledge in dissent noted that there is no clearly established Supreme Court precedent that provided for this result:

> But I simply do not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an *actual-prejudice* standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead. [Pet. App. 24a (emphasis in original).]

And there was no showing of actual prejudice here.

This Court has identified exceptions to the "general requirement" that a criminal defendant prove prejudice for a claim of ineffective assistance of counsel, but has not identified the right to public trial as one of the claims of error that is an exception.[9] In *Strickland*, this Court described the circumstances under the Sixth Amendment where prejudice is presumed – where there is an actual or constructive denial of counsel, state interference with counsel's assistance, or the counsel has an actual conflict of interest.[10] *Strickland* did not list the right to a public trial.

A plurality of this Court in *Fulminante v. Arizona* noted that the list of structural error includes

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[9] *Strickland*, 466 U.S. at 693.

[10] *Strickland*, 466 U.S. at 691-692.

the right to a public trial among others.[11] But this Court has not identified that ineffective assistance of counsel from a claim of error based on the right to a public trial as being among the list of exceptions to *Strickland* in requiring proof of actual prejudice.

In fact, in an analogous setting, this Court has required proof of a showing of actual prejudice to overcome a procedural bar arising from the failure to challenge a structural error at trial – exclusion of members of the defendant's race from the grand jury. In *Francis v. Henderson*, this Court examined in a habeas corpus proceeding the claim that a habeas petitioner argued that his conviction was obtained improperly because African Americans had been excluded from his grand jury.[12] This claim was procedurally defaulted in State court for his failure to

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[11] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (Rehnquist, CJ., plurality opinion)("Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4 (2006) ("Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. *See Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance')").

[12] *Francis v. Henderson*, 425 U.S. 536, 538 (1976).

object to the process.[13] This Court concluded that the habeas petitioner must prove "actual prejudice" to avoid the application of the default:

> We conclude, therefore, that the Court of Appeals was correct in holding that the rule of *Davis v. United States* applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment. In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of *actual prejudice*.[14]

In citing the decision in *Davis v. United States*, this Court specifically noted that "'[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.'"[15] This decision has not been overruled.

The decision by the Sixth Circuit majority here conflicts with *Henderson*. The Sixth Circuit majority

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[13] *Henderson*, 425 U.S. at 538.

[14] *Henderson*, 425 U.S. at 542 (emphasis added; footnote omitted).

[15] *Henderson*, 425 U.S. 542 n. 6, quoting *Davis v. United States*, 411 U.S. 233, 244-245 (1973).

indicated that the presumption of prejudice would allow Johnson to show prejudice to overcome his procedural default. See Pet. App. 18a.[16] Despite this Court's holding in *Henderson*, the Sixth Circuit majority concluded that prejudice would be presumed for both the default and ineffective assistance of counsel claim if the State trial court would not have ordered the courtroom closed. This conclusion cannot be reconciled with *Henderson*. The rule articulated by *Henderson* ensures that a criminal defendant will raise his claims in a timely fashion, and not harbor error as an appellate parachute.

The significance of the Sixth Circuit's decision here is heightened by this Court's recent decision in *Presley v. Georgia*.[17] This Court reiterated the point that this right under the Sixth Amendment to a public trial applies to the voir dire itself.[18] Therefore, under the Sixth Circuit's decision here, any cases in which the State courts may have closed the courtroom during voir dire to accommodate prospective jurors would be subject to a challenge under *Presley* without any requirement of *proving actual prejudice*. An allegation of deficient performance for failing to object to the

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[16] *Johnson v. Sherry*, 586 F.3d 439, 447 n. 7 (6th Cir. 2009) ("As discussed in *Owens*, 483 F.3d at 64 n.13, Johnson must make two showings of prejudice. First, he must show that counsel's failure to object to the trial closure prejudiced him for purposes of determining whether there was ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Second, he must show prejudice to excuse his procedural default on the public trial claim. *Coleman*, 501 U.S. at 750. As was true in *Owens*, "[w]e believe that these showings of prejudice overlap, and we [address] them simultaneously." 483 F.3d at 64 n.13[.]").

[17] *Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721 (2010).

[18] *Presley*, 130 S. Ct. at 725.

closing of the courtroom may be alone sufficient to establish a claim of ineffective assistance of counsel.

2. The circuits have reached conflicting decisions on this same issue.

Two other circuits that have addressed this issue have reached conflicting conclusions.

In *Owens v. United States*, the First Circuit determined that an ineffective assistance counsel of claim based on the failure to object to a courtroom closure does not require proof of prejudice because the error is structural and is not subject to harmless error analysis:

> If the failure to hold a public trial is structural error, and it is impossible to determine whether a structural error is prejudicial, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice.[19]

This analysis is rooted in the First Circuit's determination that the nature of the error defies harmless-error analysis.[20] In reaching this conclusion,

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[19] *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007)(citations omitted).

[20] *Owens*, 483 F.3d at 63-64. *See also United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997) ("We add that if we were to hold that the error [violating the right to a public trial] was not structural and thus subject to harmless error analysis, it would almost always be held to be harmless.").

however, the First Circuit essentially declined to follow *Francis v. Henderson*, asserting that *Henderson* had been "substantially weakened" in light of subsequent cases including *Fulminante*.[21]

In contrast, in *Purvis v. Crosby*, the Eleventh Circuit determined that the habeas petitioner was required to prove prejudice under *Strickland* in order to prevail on a claim that the State trial court improperly closed the courtroom.[22] The closure in *Purvis* occurred during the testimony of single witness – the young complaining witness – and some members of the public were allowed to remain.[23] Even so, the Eleventh Circuit examined this partial closure as a structural error and determined that *Strickland* required proof of actual prejudice:

> We cannot dispense with the prejudice requirement for attorney error of this type without defying the Supreme Court's clear holding that except in three limited circumstances [described in *Strickland*], which are not present here, a defendant must show that any error his counsel committed "actually had an adverse effect on the defense." *That means he must prove a reasonable probability of a different result.*[24]

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[21] *Owens*, 483 F.3d at 65 n. 14.

[22] *Purvis v. Crosby*, 451 F.3d 734, 741 (11th Cir. 2006).

[23] *Purvis*, 451 F.3d at 740.

[24] *Purvis*, 451 F.3d at 741 (citation omitted; emphasis added).

Significantly, the Eleventh Circuit reasoned that its decision was required by *Henderson* and *Davis* on the standard for showing actual prejudice to overcome a default because otherwise these decisions "would be pointless."[25]

The First Circuit in *Owens* issued its decision under 28 U.S.C. § 2255 and noted that considerations of "comity and federalism might justify the requirement" that a habeas petitioner prove prejudice in its effort to distinguish *Purvis*.[26] There is no basis, however, on which to reconcile the Sixth Circuit's decision here – also a habeas case – with *Purvis*. The Sixth Circuit majority never cited *Henderson* and *Davis*, and did not explain how its procedural default analysis could be reconciled with these decisions. This Court should grant certiorari to resolve this split and to clarify the rule for proving actual prejudice where the underlying claim is structural error (the violation of the right to a public trial) when the claim is either defaulted or subject to a claim of ineffective assistance of counsel, or both. There is no clearly established Supreme Court precedent that supported the Sixth Circuit's decision here.

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[25] *Purvis*, 451 F.3d at 743.

[26] *Owens*, 483 F.3d at 65 n. 14.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

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No. 08-1322
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 28, 2010
LEONARD GREEN, Clerk

WILLIAM JOHNSON, Petitioner-Appellant, v. JERI -ANN SHERRY, WARDEN, Respondent-Appellee.) ORDER

BEFORE: COLE, CLAY, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Kethledge would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 09a0398p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM JOHNSON,
Petitioner-Appellant,
v.
JERI ANN SHERRY, Warden,
Respondent-Appellee.

No. 08-1322

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-11214—Bernard A. Friedman, District Judge.

Argued: ~~June 10, 2009~~ August 7, 2009

Decided and Filed: November 13, 2009

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Andrew L. Shirvell, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF**: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Brian O. Neill, OFFICE OF

THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

CLAY, J., delivered the opinion of the court, in which COLE, J., joined. KETHLEDGE, J. (pp. 12–15), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Petitioner William Johnson ("Johnson") appeals the district court's judgment denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On appeal, he argues that the state violated his Sixth Amendment right to a public trial when it excluded the public from the courtroom during portions of his jury trial and that his Sixth Amendment right to effective assistance of counsel was violated when his trial attorney failed to object to the closure. For the reasons that follow, we **VACATE** the judgment of the district court and **REMAND** for an evidentiary hearing.

I. BACKGROUND

A. Procedural History

On January 10, 2003, a jury convicted Johnson of one count of second degree murder in violation of Michigan Compiled Laws ("MCL") § 750.317; three counts of assault with intent to commit murder in violation of MCL § 750.83; and possession of a firearm during the commission of a felony in violation of MCL § 750.227b. Johnson was sentenced to concurrent prison terms of thirty-five to sixty years for the murder

conviction and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony firearm conviction.

Johnson timely filed a motion for a new trial and requested an evidentiary hearing, but his motion was denied. His convictions were affirmed on direct appeal, and the Michigan Supreme Court denied his application for leave to appeal. Johnson timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan and his petition was denied on February 12, 2008. Johnson timely filed a notice of appeal, along with a request for a certificate of appealability ("COA") on numerous issues. The district court granted a partial COA, certifying Johnson's claims that he was denied his right to a public trial and that his attorney was ineffective in failing to object to the closure of the courtroom. This Court entered an order stating that only the claims certified by the district court would be heard.

B. Substantive Facts

The Michigan Court of Appeals outlined the facts underlying Johnson's convictions as follows:

> Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among

partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified [Johnson] at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read [to the jury] at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement. . . .

At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three

> prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

(R. at 85-86.)

Following his conviction, Johnson filed a motion for a new trial claiming denial of the right to a public trial. In denying the motion, the trial court noted that counsel agreed to the suggested closure and that counsel asked members of Johnson's family not to appear in the courtroom until after 11:00 a.m. the following day. After exhausting this claim and an ineffective assistance of counsel claim in the state courts, Johnson filed a petition for habeas relief in federal district court pursuant to 28 U.S.C. § 2254. Among other claims, Johnson claimed that his right to a public trial was violated and that counsel was ineffective for failing to assert that right. In the district court's opinion denying habeas relief, the court held

that Johnson's claim was procedurally defaulted, providing the following explanation:

> [I]n this case, Respondent's procedural default argument is not based upon defendant's failure to object, it is based upon his consent, through counsel, to the courtroom closure. Respondent argues that this acquiescence constituted a waiver of this claim. The Court finds that Petitioner waived his right to a public trial by his acquiescence, through his attorney, to the closure.

(R. at 1602.) The district court also explained, in the alternative, that the claim would fail on the merits:

> The Court finds that the state court's conclusion was a reasonable application of *Waller*. While the trial court's findings could have been more clearly articulated on the record, it was, as observed by the Michigan Court of Appeals, a reasonable conclusion that the suspicious deaths of two witnesses had, in the trial court's opinion, sparked enough fear in three witnesses and sufficiently placed their well-being at risk to override Petitioner's right to a public trial. The trial court limited the closure to just three witnesses and ensured that the closure would not be evident to the jury. Considering these circumstances, the Court finds that the state court's application of the *Waller* factors was not unreasonable.

(R. at 1603.)

With respect to Johnson's ineffective assistance of counsel claim, the Michigan Court of Appeals concluded that "trial counsel's acquiescence was neither objectively unreasonable, nor outcome-determinative." (R. at 1148.)[1] The district court agreed, holding that because "the decision to close the courtroom for a limited time was not an unreasonable application of *Waller* . . . Petitioner has failed to establish that the failure to object to the closure fell 'outside the wide range of professionally competent assistance'" as required by *Strickland v. Washington*, 466 U.S. 668, 689 (1984). (R. at 1611.)

II. DISCUSSION

A. Standard of Review

Because Johnson filed his habeas petition in 2006, his petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). Under the AEDPA, Johnson may obtain relief only if he can show that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or that the state court relied on an "unreasonable determination of the facts in light of the

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[1] It is unclear what "outcome determinative" means, because, as discussed below, if the counsel's actions resulted in a closure that was unjustified or broader than necessary, prejudice would be presumed.

evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). In reviewing a district court's decision to grant or deny habeas relief, this Court reviews questions of fact under a "clearly erroneous" standard and questions of law *de novo*. *Carson v. Burke*, 178 F.3d 434, 436 (6th Cir. 1999).

B. Analysis

Johnson's appeal presents two interrelated issues: (1) whether his Sixth Amendment right to a public trial was violated when the court closed the courtroom during the testimony of three prosecution witnesses; and (2) whether trial counsel was constitutionally ineffective for failing to object to the closure.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; *see also In re Oliver*, 333 U.S. 257, 278 (1948) (holding this right to be binding on the states through the due process clause of the Fourteenth Amendment). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks and citations omitted). Because of the "'great, though intangible, societal loss that flows' from closing courthouse doors," the denial of a right to a public trial is considered a structural error for which prejudice is presumed. *Id.* at

50 n.9 (quoting *People v. Jones*, 47 N.E.2d 1335, 1340 (N.Y. 1979)). In light of these concerns, to justify the closure of a courtroom over the objections of a defendant, "the party seeking to close [a public] hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48 (applying the test set forth in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), to a Sixth Amendment public trial claim).[2]

In the instant case, the prosecution moved to close the courtroom during the testimony of three prosecution witnesses. The prosecutor informed the court that two witnesses had been killed "under very suspicious grounds" near the time of the preliminary examination and that a number of the remaining witnesses were afraid to testify at trial. (R. at 138-39.) The trial court expressed concerns regarding the closure, stating that the prosecutor was "treading on some very dangerous ground," and inquired "[w]ell, if

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[2] The four-part test discussed above was first developed in *Press-Enterprise*, 464 U.S. at 510, which addressed the First Amendment right to public jury selection. The *Waller* Court adopted the test in the context of the Sixth Amendment right to a public trial, explaining that "there can be little doubt that the explicit *Sixth Amendment* right of the accused is no less protective of a public trial than the implicit *First Amendment* right of the press and public." 467 U.S. at 46 (emphasis added).

these persons are essentially being protected . . . what is their concern about?" (R. at 138-40.) Nonetheless, defense counsel acquiesced to the closure, stating:

> Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since [the prosecution] brought it to my attention. If the Court wants to do that, [i.e., close the courtroom], we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem.

(R. at 387.) The court accepted defense counsel's position without making further inquiry or findings, and defense counsel instructed members of Johnson's family to remain outside of the courtroom during the testimony at issue.

Johnson concedes that his attorney acquiesced to the closure, but argues that because the right to a public trial is a fundamental constitutional right and a structural guarantee, his attorney's statements were insufficient to constitute waiver. While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for closure is sufficient to overcome the public and media's First Amendment right to an open and public trial proceeding. *See Freytag v. Commissioner*, 501 U.S. 868,

896 (1991) ("[T]he Sixth Amendment right to a trial that is 'public,' provide[s] benefits to the entire society more important than many structural guarantees; but if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (collecting cases); *see also Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960)). Because Johnson failed to object to the closure, his claim is procedurally defaulted unless he can show cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. Here, it is undisputed that Johnson failed to make a contemporaneous objection to the closure, which is required by an "independent and adequate state procedural rule." *United States v. Frady*, 456 U.S. 152, 168 (1982). It is also evident that the last state court from which Johnson sought review invoked the state procedural rule as a basis for its decision to reject review of the claim. (*See* R. at 86 (state court of appeals stated that Johnson "expressly waived his right by

assenting to the trial court's decision to close the courtroom during the three witnesses' testimony." (citations omitted).) Thus, the district court found that Johnson's claim was denied based on an independent and adequate state procedural rule.[3]

Under these circumstances, federal habeas review of Johnson's public trial claim is barred unless Johnson can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Johnson argues

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[3] Johnson argues that the state procedural default was not an independent and adequate state ground barring subsequent federal review because Michigan courts "regularly waive contemporaneous objection defaults where the issue is perceived to concern constitutional due process rights" and that, here, the state court did so when it reached the merits of his public trial claim. (Johnson's Reply Br. 4.) However, while the state court did discuss the merits of Johnson's public trial claim, it clearly did so as an *alternative* basis for denying the claim, and the procedural default rule applies. (*See* R. at 86 ("[D]efendant expressly waived his right by assenting to the trial court's decision. . . . Moreover, the right to a public trial is not absolute . . . .")); *see also Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. . . . [R]econsideration of the federal issue on federal habeas [is curtailed] as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision.") (emphasis in original).

that he has demonstrated cause for the default because his counsel was ineffective in failing to object to the closure of the trial. Consequently, both of Johnson's claims on appeal turn on whether his counsel was constitutionally ineffective.[4]

In order to establish ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and that "the deficient performance prejudiced [his] defense." *Strickland*, 466 U.S. at 687-88. In the instant case, we agree that defense counsel's failure to object to the closure of Johnson's trial may have fallen below an "objective standard of reasonableness" as required in *Strickland*. Courts have been clear that while the closure of a trial may be justified in certain cases, "[s]uch circumstances will be rare. . . and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45; *see also Press-Enterprise*, 464 U.S. at 510 (holding that a closure may be justified only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007) (holding that the failure to object to the courtroom closure for a day of jury selection deprived defendant of a substantial fair trial right).
Counsel's failure to object to the closure of the courtroom during the testimony of three key

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[4] Attorney error can only constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland*, 466 U.S. 668. *See Coleman*, 501 U.S. at 752; *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

prosecution witnesses, arguably the most important phase of Johnson's trial, denied Johnson a substantial fair trial right and counsel should have approached the issue with caution.

Given the absence of on-the-record findings by the trial court, it is difficult for us to discern whether it was necessary for the courtroom to be closed to all spectators for the testimony at issue. However, on the record before us, we are far from convinced that this was the "rare" circumstance where closure was justified, or that the closure was "no broader than necessary" to protect the interest advanced by the state under *Waller*, 467 U.S. at 48. While the prosecution made general allegations that two prosecution witnesses—Elvin Robinson and Robert Richards—had been murdered, Johnson stresses that another individual was charged with the stabbing of Elvin Robinson, and the prosecution offered no proof that Johnson or any member of Johnson's family was involved in the death of those individuals. *See Waller*, 467 U.S. at 48 (requiring the party seeking the closure to provide specific evidence of an overriding interest that was likely to be prejudiced). The prosecution presented no witnesses or evidence in support of the closure, and did not point to any incidents in which the witnesses at issue had been threatened or otherwise contacted by any member of Johnson's family. In fact, both the court and the prosecution acknowledged that

the request was on thin or dangerous ground.[5] Notwithstanding these circumstances, defense counsel made no effort to limit the closure to less than three witnesses, or to ensure that the excluded individuals be limited to those individuals who might be perceived as a threat to the witnesses. Under these circumstances, defense counsel's acquiescence to the closure appears unjustified.[6]

To be sure, counsel's decision would be owed deference if it could be viewed as strategic, and counsel may have been privy to information of which we are unaware. *See Strickland*, 466 U.S. at 689 (explaining that a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy). For example, defense counsel may have known that Johnson's family members had a history of contact with the relevant

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[5] The prosecutor stated that "[t]he only case law I really found deals with small children [who we]re intimidated by someone present in those cases," acknowledged that his motion was on "very thin ground," and noted that he was sure that defense counsel would have an objection to the closure. (R at 138-39.) When the prosecution requested closure, the trial court stated that the prosecutor was "treading on some very dangerous ground." (*Id.* at 138.)

[6] Johnson alleges that the family members who were excluded included four aunts, ranging from 38 to 50 years in age, and a female first cousin who was 38 years old. Johnson's Br. 7. In *In re Oliver*, 333 U.S. 257, 272 (1948), the Supreme Court explained that a defendant has a particularly compelling interest in having his family present at his trial.

witnesses or he may have known more about the nature of the alleged witness killings than the record revealed. However, if counsel had additional relevant information, it is not evident from the record. No court below conducted an evidentiary hearing to explore these matters, and, on the record before us, it is difficult to see how the failure to object to the closure could have been strategic. *See id; see also Owens*, 483 F.3d at 66 (remanding for an evidentiary hearing when there was no indication that counsel's failure to object to a closure was strategic).

Consequently, an evidentiary hearing is warranted to determine if trial counsel's failure to object to the closure constitutes deficient performance. If Johnson can establish that counsel's performance was deficient, he will also be required to demonstrate that he was prejudiced by the error. *See Coleman*, 501 U.S. at 750 (requiring a showing of prejudice to excuse procedural default of a claim); *Strickland*, 466 U.S. at 687 (requiring a showing of prejudice to establish ineffective assistance of counsel). There would be no prejudice—either with respect to Johnson's ineffective assistance of counsel claim or with respect to the showing of prejudice necessary to excuse procedural default—if the government's interest in closure was so compelling that the closure at issue would have been ordered notwithstanding counsel's objection. However, in light of the compelling interest in a public trial and the rigorous test set forth in *Waller*, we are far from confident that the closure would have been implemented as suggested by the prosecution over Johnson's objections. Because the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would

be presumed. *See Waller*, 467 U.S. at 50 n.9; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (citing *Waller* for the proposition that "violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance'"). Consequently, if evidence reveals that counsel's failure to object fell below an objective standard of reasonableness, there is a strong likelihood that counsel's deficient performance would be deemed prejudicial.[7]

In sum, we are deeply concerned by the lack of attention afforded to Johnson's fundamental right to a public trial and conclude that further exploration of

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[7] As discussed in *Owens*, 483 F.3d at 64 n.13, Johnson must make two showings of prejudice. First, he must show that counsel's failure to object to the trial closure prejudiced him for purposes of determining whether there was ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Second, he must show prejudice to excuse his procedural default on the public trial claim. *Coleman*, 501 U.S. at 750. As was true in *Owens*, "[w]e believe that these showings of prejudice overlap, and we [address] them simultaneously." 483 F.3d at 64 n.13; *Cf. Strickler v. Greene*, 527 U.S. 263, 282 (1999) ("In this case, cause and prejudice [for procedural default] parallel two of the three components of the alleged [trial error] itself.")

this issue is warranted.[8] On this record, it is virtually impossible to determine whether the closure of the trial was justifiable. Once further facts are available, the district court will be better equipped to determine whether closure of the trial was justified, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Johnson's public trial claim can be satisfied.

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[8] While defense counsel's objection triggers the trial court's duty to make factual findings under *Waller*, the court could have averted the issues presented in this appeal by conducting a detailed inquiry before agreeing to the prosecutor's request. The Supreme Court has made clear that trial closures infringe upon an important structural guarantee and that they should be rare. *Waller*, 467 U.S. at 45. Moreover, while First Amendment issues were not raised in this case, the public and the press also have a compelling First Amendment interest in a public trial. *See Press-Enterprise*, 464 U.S. at 509-10 ("[The] circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.") (internal quotation marks and citation omitted). Given the great, though intangible, societal loss that flows from closing courthouse doors, *Waller*, 467 U.S. at 50 n.9, a prudent court should carefully scrutinize a party's request before agreeing to close a courtroom.

CONCLUSION

For the reasons stated above, we **VACATE** the district court's judgment denying habeas relief and **REMAND** for an evidentiary proceeding to determine whether the trial closure was justifiable, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Johnson's public trial claim can be satisfied.

DISSENT

KETHLEDGE, Circuit Judge, dissenting. In defending a murder charge, it is a bad idea, I think, to leave the judge with a smoldering suspicion that your client had a role in killing two of the prosecution's key witnesses before trial. A lawyer who minimizes that danger—by consenting to, rather than fighting, closure of the courtroom during the testimony of three surviving witnesses, out of a total of 18 testifying witnesses in the case—does not thereby render constitutionally ineffective assistance of counsel. That is all the more true, in my opinion, when there is not a shred of evidence that the closure had the slightest effect on the trial's outcome.

The majority concludes otherwise. The majority suggests that the closure fight here was one worth having—indeed, that it was constitutionally mandated—its ethereal upside and concrete downside notwithstanding. The majority then sidesteps the absence of any actual prejudice resulting from Johnson's consent to the closure—and with it, the

plainly stated actual-prejudice requirement of *Strickland v. Washington*, 466 U.S. 668 (1984)—by holding that Johnson need not show any prejudice at all in support of his ineffective-assistance-of-counsel claim. That holding is not supported by "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which means that we are without power to impose it on the Michigan state courts in this habeas case. I respectfully dissent.

* * *

The majority and I agree that Johnson's habeas petition fails unless he can prove his ineffective-assistance-of-counsel claim. To prove that claim, Johnson must first show that his "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That showing requires, of course, proof that counsel committed errors in the first place. Second, Johnson "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. We review for an abuse of discretion a district court's decision whether to hold an evidentiary hearing on these issues. *See Ivory v. Jackson*, 509 F.3d 284, 297 (6th Cir. 2007).

The district court did not abuse its discretion here, because Johnson's claim clearly fails on both grounds. First, prior to trial, two witnesses identified Johnson as the shooter in a barrage that left Carlos Davis dead, Larry Lewis and James Mathis wounded, and Robert Richards untouched by the bullets that Johnson fired toward him.

Richards was unavailable to testify at trial—because he had been shot to death, in bed, after his testimony at Johnson's preliminary exam. Another prosecution witness, Elvin Robinson, was shot to death before he was able to testify at Johnson's exam. At trial, the prosecution moved to close the courtroom during the testimony of three surviving witnesses: Damon Ramsuer, who was the sole surviving witness to have identified Johnson as the shooter; and Lewis and Mathis, two of the persons Johnson shot. In support of its motion, the prosecution explained that all three witnesses were "literally terrified" and were "cowering, refusing to come to court, even under threat of being arrested, because they [were] afraid for their lives." Johnson's counsel chose not to pick this particular fight—truly a strategic decision if there ever was one—and, after consulting with Johnson, affirmatively agreed to the three-witness closure.

The question before us is whether that decision was so far outside the bounds of competent representation as to amount to constitutionally ineffective assistance of counsel. I do not think the decision can possibly be seen that way. Having reviewed the trial transcript, it seems to me instead that the decision was *correct*. Johnson's counsel essentially agreed to close the courtroom during the testimony of three witnesses, out of a total of 18 witnesses at trial. Strategically the net effect of that closure, as Johnson now describes it, was that several of his "female relatives" did not witness the testimony of those three witnesses. In return, Johnson's counsel deflected the trial judge from a line of inquiry—as to why, exactly, these three witnesses were so terrified to

testify against Johnson—that almost certainly would have reflected poorly on his client. That avoidance appears all the wiser given that it emerged at Johnson's sentencing—and perhaps could have emerged sooner, had Johnson's counsel fought the closure—that Richards was shot to death with ammunition from the same lot that Johnson used to kill Davis and wound Lewis and Mathis. The Constitution, suffice it to say, permitted this strategic choice.

Second, there is no evidence in the record—which includes the entire transcript of Johnson's trial—that Johnson's consent to closure as to three witnesses had any effect on the outcome of his murder trial. The majority does not assert the contrary. Instead, the majority holds, "[b]ecause the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed." Maj. Op. at 10. In so holding the majority drives right past the distinction between a *Waller* claim and a *Strickland* one. What the majority says is true enough for a *Waller* claim, but Johnson's petition undisputedly turns on a *Strickland* one; and *Strickland* repeatedly and unequivocally says that *actual prejudice* is required. *See, e.g.*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*") (emphasis added); *id.* at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding").

Reasonable jurists can disagree as to whether, when a defendant asserts an ineffective-assistance claim based on an underlying violation of his right to a public trial, the *Waller* definition of prejudice should trump the *Strickland* one, or vice versa. In a lengthy analysis of this very issue, the Eleventh Circuit held that the *Strickland* actual prejudice requirement applies. *See Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006). (Our decision today directly conflicts with that decision.) The First Circuit has held that the *Waller* definition prevails, see *Owens v. United States*, 483 F.3d 48, 64-66 & n.14 (1st Cir. 2007)—although, critically, it did so in considering a challenge to an underlying *federal* conviction, *see* 28 U.S.C. § 2255, and thus was not limited, as we are here, to deciding whether "*clearly established* Federal law, as determined by the Supreme Court," requires that result. *Id.* § 2254(d)(1) (emphasis added). But I simply do not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an *actual-prejudice* standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead.

What has been clearly established for decades is that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. Johnson has not touched that presumption here. I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM JOHNSON,

Petitioner,

v. Case Number: 2:06-CV-11214
HON. BERNARD A. FRIEDMAN

JERI-ANN SHERRY,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner William Johnson, through counsel, has filed a petition for a writ of habeas corpus. Petitioner is currently incarcerated at the Chippewa Correctional Facility in Kincheloe, Michigan, pursuant to convictions for second-degree murder, three counts of assault with intent to commit murder, and possession of a firearm during the commission of a felony. For the reasons set forth below, the Court denies the petition.

II. Background

Petitioner's convictions arise from events that occurred outside a BHA Hall in Hamtramck, Michigan. The Michigan Court of Appeals summarized the facts as adduced at Petitioner's trial as follows:

Defendant's convictions arise from the fatal shooting of Carlos Davis and nonfatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told police that he saw the shooter, and he gave a detailed description of [the shooter's] clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling police that he saw the shooter, and denied making an

> identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

Johnson, slip op. at 1.

III. Procedural History

Following a jury trial in Wayne County Circuit Court, Petitioner was convicted of second-degree murder, three counts of assault with intent to murder, and possession of a firearm during the commission of a felony. On February 13, 2003, Petitioner was sentenced to 35-60 years imprisonment for the murder conviction, 20-40 years imprisonment for each of the assault convictions, all to be served concurrently with one another and consecutively to two years imprisonment for the felony-firearm conviction.

Petitioner filed a motion for a new trial and for an evidentiary hearing. He requested an evidentiary hearing regarding his claims that he was denied his right to a public trial and that he was denied the effective assistance of counsel. The trial court denied Petitioner's motions. People v. Johnson, No. 02-012133-01 (Wayne County Circuit Court Sept. 30, 2003).

Petitioner filed an appeal of right in the Michigan Court of Appeals, raising the following claims:

> I. Where the court excluded the public including Appellant's family from the courtroom while three witnesses testified, was Appellant's constitutional right to a public trial violated?

II. Did prosecutorial misconduct deny due process of law in the following ways:

a. The prosecutor's arguments denigrated defense counsel before the jury, thus diluting the presumption of innocence. The argument acted as a comment on his right to counsel, the right to the effective assistance of counsel, and the right to present a defense;

b. The prosecution's strategy introducing and arguing the element of fear before the jury constituted prosecutorial misconduct and denied Appellant a fair trial and due process of law; and

c. The prosecutor commented on the defendant's exercise of his right to remain silent and right not to testify and he shifted the burden of proof?

III. Was Appellant denied a fair trial when the trial judge told the jury over objection that the prosecution's only eyewitness was unavailable because he was deceased?

IV. Was Appellant denied the effective assistance of counsel in the following ways:

a. Defense counsel failed to object to the closing of the courtroom to the public;

b. Defense counsel's decision to call Janard Thomas and Letrulia Johnson as witnesses was an unreasonable strategy;

c. Defense counsel opened the door to testimony on fear;

d. Defense counsel failed to object to prosecutorial misconduct; and

e. Defense counsel failed to call an eyewitness whose testimony would have been exculpatory?

V. Did the trial court err in failing to hold a hearing on whether the out-of-court identification and the in-court identification were the result of an impermissibly suggestive procedure, where a group shot from the party was displayed to the eyewitness and the only person in the photo whose clothing matched the description of the perpetrator was the Appellant. Was Appellant also denied his right to counsel where the investigation had focused on but an attorney was not present at the identification procedure?

VI. Was Appellant denied due process of law and his right to a proportionate sentence where the court erred in the scoring of the guidelines and erred in its decision to exceed the guidelines?

The Court of Appeals granted Petitioner's motion to file a supplemental brief, adding the following additional claim:

> VII. Did the sentence imposed by the court violate Appellant's right to trial by jury, the right to due process of law, and the right to be free from excessive punishment?

The Michigan Court of Appeals affirmed Petitioner's convictions and sentences. People v. Johnson, No. 247227 (Mich. Ct. App. Aug. 24, 2004). Petitioner filed a motion for reconsideration on the ground that the trial court failed to address the issue raised in his supplemental brief. The court of appeals denied the motion for reconsideration. People v. Johnson, No. 247227 (Mich. Ct. App. Sept. 30, 2004).

Petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims raised before the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal because it was "not persuaded that the questions presented should be reviewed by this Court." People v. Johnson, No. 127293 (Mich. May 31, 2005).

Petitioner, through counsel, then filed the pending petition for a writ of habeas corpus, raising the following claims:

> I. Where the court excluded the public including Petitioner's family from the courtroom while three prosecution witnesses testified, was Petitioner's constitutional right to a public trial violated?

II. Did prosecutorial misconduct deny Petitioner due process of law in the following ways:

a. The prosecution's strategy introducing and arguing the element of fear of the defendant was fundamentally unfair;

b. The prosecution's argument denigrated defense counsel before the jury thus diluting the presumption of innocence. The argument acted as a comment on his right to counsel, the right to the effective assistance, and the right to present a defense;

c. The prosecutor commented on the defendant's exercise of his right to remain silent and right not to testify and he shifted the burden of proof?

III. Was Petitioner's right to a fair trial denied when the trial judge told the jury over objection that the prosecution's only eyewitness was unavailable because he was deceased?

IV. Was Petitioner denied the effective assistance of counsel in the following ways:

a. Defense counsel failed to object to the closing of the courtroom to the public;

b. Defense counsel's decision to call Janard Thomas and Letrulia Johnson

as witnesses was an unreasonable strategy;

c. Defense counsel opened the door for testimony on fear;

d. Defense counsel failed to object to prosecutorial misconduct; and

e. Trial counsel failed to call an eyewitness whose testimony would have been exculpatory?

V. Did the trial court err in failing to hold a hearing on whether the out-of-court identification and the in-court identification were the result of an impermissibly suggestive procedure where a group photo taken at the party was displayed to the eyewitness and the only person in that photo whose clothing matched the description of the perpetrator was the Petitioner? Was Petitioner also denied his right to counsel where the investigation had focused on Petitioner but an attorney was not present at the identification procedure?

VI. Was Petitioner denied due process of law and was his right to a jury trial denied where his sentence was based on guideline factors not found by a jury to have been proven beyond a reasonable doubt?

IV. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual

determinations. 28 U.S.C. § 2254(e)(1)[1]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000).

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[1] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

V. Analysis

A. Right to a Public Trial

Petitioner argues that his Sixth Amendment right to a public trial was violated when the trial court

closed the courtroom to the public during the testimony of three prosecution witnesses. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right is applicable to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

"The central aim of a criminal proceeding must be to try the accused fairly." Waller v. Georgia, 467 U.S. 39, 46 (1984). The public-trial guarantee was created to further that aim. Id., *citing* Gannett Co. V. DePasquale, 443 U.S. 368, 380 (1979). A public trial helps to ensure that judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. Id. The violation of the constitutional right to a public trial is a structural trial error, not subject to the harmless error analysis. Id. at 49-50, n.9.

A closure does not violate the Sixth Amendment where: (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced by an open courtroom; (2) the party seeking closure demonstrates that the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings adequate to support the closure. Id. at 48.

Respondent argues that this claim is procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, Coleman, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

A state procedural default is not an "independent and adequate state ground" barring subsequent federal review unless the state rule was "firmly established and regularly followed" at the time

it was applied. Ford v. Georgia, 498 U.S. 411, 423-24 (1991). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." Simpson, 94 F.3d at 202.

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

This Court begins its analysis of whether Petitioner's claim is procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claim. *See* Coleman, 501 U.S. at 729-30. The last state court to issue a reasoned opinion addressing the allegedly procedurally defaulted claim was the Michigan Court of Appeals. The state court of

appeals held that because defense counsel did not object to the exclusion of spectators, the issue was not preserved for review. Johnson, slip op. at 2.

Petitioner argues that the state court of appeals' reliance on the contemporaneous-objection rule should not serve to default his claim because, at the time of Petitioner's trial, Michigan courts regularly addressed the merits of a claim on appellate review if the claim involved a "significant constitutional question." *See* Petitioner's Reply Brief at p. 3.

This Court recently addressed a similar claim of procedural default in the context of a claimed violation of the right to a public trial and held:

> While the contemporaneous objection rule is fairly established as a preferred procedure and appears to be regularly followed as to some claims, Michigan courts regularly waived contemporaneous objection defaults at the time of Petitioner's conviction when the issue was perceived to concern "constitutional due process rights." *See, e.g.*, People v. Crear, 242 Mich. App. 158, 166 (Mich. Ct. App. 2000); *see also* People v. Wilson, 230 Mich. App. 590, 593; People v. Johnson, 215 Mich. App. 658, 669 (Mich. Ct. App. 1996); Watson v. Watson, 204 Mich. App. 318, 319 (Mich. Ct. App. 1994). State procedural requirements which are not regularly followed cannot prevent federal review of alleged constitutional

violations. Barr v. City of Columbia, 378 U.S. 146, 148 (1964). *Accord* James v. Kentucky, 466 U.S. 341, 348-49 (1984). "A rule of exception which itself depends on the perceived merits of the federal claim cannot fairly be considered 'adequate and independent' of federal law so as to preclude federal habeas review." Griffin v. Berghuis, 298 F. Supp. 2d 663, 672 (E.D. Mich. 2004), *quoting* Bentley, 239 F. Supp. 2d at 694.

Petitioner's claim that her right to a public trial was violated unquestionably presented a significant constitutional question. Michigan courts regularly waived contemporaneous objection defaults in such circumstances. Accordingly, the Court finds that the state court's decision not to address this claim was not based upon a "firmly established and regularly followed" state procedural rule and, therefore, that the claim is not procedurally defaulted. Ford, 498 U.S. at 423-24. *Cf.* Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004) (holding that habeas petitioner had not waived right to a public trial by failing to object at trial because a right to a public trial is a fundamental trial right which may be relinquished only upon a showing that defendant knowingly and voluntarily waived such a right).

Salem v. Yukins, 414 F. Supp. 2d 687, 696-697 (E.D. Mich. 2006).

While the circumstances here are similar to those present in Salem, there is an important distinction between the two cases. In Salem, defense counsel clearly objected to the courtroom closure, but the state court held that her objection was not adequate to preserve the issue for appellate review. Thus, in Salem, whether or not defense counsel's objection was considered adequate to preserve the issue, there was no question that counsel did not acquiesce to the courtroom closure. Therefore, she did not waive the issue.

In contrast, in this case, Respondent's procedural default argument is not based upon defendant's failure to object, it is based upon his consent, through counsel, to the courtroom closure. Respondent argues that this acquiescence constituted a waiver of this claim. The Court finds that Petitioner waived his right to a public trial by his acquiescence, through his attorney, to the closure.

Moreover, even if this issue were not waived, Petitioner has failed to show that the state court's decision was contrary to or an unreasonable application of Waller. The state court, although finding that the claim was not preserved for appellate review, proceeded to address the merits of the claim for plain error. The state court applied the four requirements for courtroom closure articulated in Waller, and held, in pertinent part:

> Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989). The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent form the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in Kline restricts courtroom closures to circumstances involving very young witnesses or direct threats. We are satisfied that [t]he suspicious deaths of two other witnesses were sufficient to jury concerns for the witnesses' safety.

Johnson, slip op. at 3.

The Court finds that the state court's conclusion was a reasonable application of Waller. While the trial court's findings could have been more clearly

articulated on the record, it was, as observed by the Michigan Court of Appeals, a reasonable conclusion that the suspicious deaths of two witnesses had, in the trial court's opinion, sparked enough fear in three witnesses and sufficiently placed their well-being at risk to override Petitioner's right to a public trial. The trial court limited the closure to just three witnesses and ensured that the closure would not be evident to the jury. Considering these circumstances, the Court finds that the state court's application of the Waller factors was not unreasonable.

B. Alleged Prosecutorial Misconduct

Petitioner alleges that the prosecutor engaged in several acts of misconduct. Specifically, Petitioner argues that the prosecutor: (i) introduced the element of fear at the trial; (ii) denigrated defense and defense counsel; and (iii) commented on Petitioner's exercise of his right to remain silent, his right not to testify, and shifted the burden of proof to Petitioner.

Respondent argues that this claim is procedurally defaulted. "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." Hudson v. Jones, 351 F.3d 212, 215 (6th Cir. 2003), *citing* Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 1523 (1997). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." Lambrix, 520 U.S. at 525, 117 S. Ct. at 1523. In this case, the Court finds that the interests of judicial economy are best served by addressing the merits of Petitioner's prosecutorial

misconduct claims. "Prosecutorial misconduct may warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." Caldwell v. Russell, 181 F.3d 731, 736 (6th Cir. 1999). The determination whether the trial was fundamentally unfair is "made by evaluating the totality of the circumstances." Angel v. Overberg, 682 F.2d 605 (6th Cir. 1982). The Court must examine "'the fairness of the trial, not the culpability of the prosecutor.'" Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), (*quoting* Serra v. Michigan Department of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993)).

1.

In his first prosecutorial misconduct claim, Petitioner argues that the prosecutor improperly introduced the element of fear into the trial by his treatment of three prosecution witnesses: Robert Richards, Damon Ramsuer, and Larry Lewis. Robert Richards was the only witness who identified Petitioner as the shooter. Ramsuer identified Petitioner to police, but later denied having done so.

Richards testified at the preliminary examination, but was killed shortly thereafter. Before his preliminary examination testimony was read to the jury, the trial court informed the jury that "Mr. Richards is now deceased. You are instructed to make no inferences or draw any conclusion from that circumstance." Tr., Vol. II, p. 138. In his opening statement, the prosecutor stated: "Mr. Richards is not available to testify. The court will tell you the circumstances surrounding that." Tr. Vol. I, p. 156.

Also, during rebuttal closing argument, the prosecutor addressed the issue of why Richards waited two days before contacting police. The prosecutor stated: "We'll never know why he didn't call the police for two days, because he's not here to tell us why." Tr., Vol. III, p. 263.

The Michigan Court of Appeals, in reviewing this claim for plain error, held that the prosecutor's reference to Richards did not suggest to the jurors that Richards died under suspicious circumstances, and, therefore, did not inject the element of fear into the trial. This Court agrees with the state court's assessment.

At trial, a police detective testified that Ramsuer identified Petitioner as the shooter from a photograph taken at the party. At trial, Ramsuer denied making the identification. Petitioner objects to the prosecutor's following statements regarding witness Damon Ramsuer:

> Keep in mind, will you, what else he said; how he didn't want to be here; how he refused to come to the preliminary exam to testify; how he refused to come to court; how he had to be locked up and arrested and held overnight to testify for his friend after he picked out Mr. Johnson as the shooter.

Tr., Vol. III, p. 217.

> He doesn't identify Mr. Williams here in court. He identified him back in May. But

> now he's not doing it. Think about why he wouldn't do that in court. Think about the reasons why we had to lock him up to bring him to court to tell on his own friend, Mr. Davis, how he was murdered. Think about these reasons when you weight the credibility . . .

Id. at 266.

Ramsuer's reluctance to testify became the subject of re-cross-examination after defense counsel opened the door to such testimony by asking Ramsuer the following question: "[I]f you had seen who fired shots that might have killed Carlos Davis, there's no reason for you not to have said that, was there?" Tr., Vol. II, p. 97. Given that defense counsel opened the door to this testimony and given the dramatic change in Ramsuer's testimony, it was fair for the prosecutor to ask the jury to consider Ramsuer's motives for testifying. As the trial court judge noted, both sides were faced with the difficult task of exploring witnesses' credibility and motives for testifying without eliciting testimony that witnesses were fearful of testifying based upon the death of Richards. This Court finds that the prosecutor's arguments regarding Ramsuer's testimony carefully avoided reference to fear.

Finally, Petitioner objects to the prosecutor's statement in closing argument that Larry Lewis was fearful about what happened to him the night of the shooting. Lewis testified that he continued to suffer mental pain from the shooting and continued to relive the night. The prosecutor's argument was a fair

interpretation of Lewis' testimony and did not invoke any fear.

In sum, the prosecutor's statements, contrary to Petitioner's claims, were not extensive. They also do not represent a "flagrant and deliberate attempt to mislead they jury by directing them toward an emotional response." Petitioner's Brief at p. 18.

2.

Second, Petitioner argues that the prosecutor denigrated defense counsel thereby diluting the presumption of innocence. Petitioner also argues that the act of denigrating defense counsel served as a comment on Petitioner's exercise of his right to counsel and right to present a defense.

Petitioner argues that the prosecutor denigrated defense counsel by eliciting testimony from all defense witnesses that none of them knew they were going to be witnesses until after speaking to defense counsel. Then, in closing argument, the prosecutor stated that the defense witnesses did not talk to the police. They spoke only to defense counsel.

The Sixth Circuit Court of Appeals has held that a prosecutor has a right to cross-examine a defense witness regarding the witness's delay in coming forward. U.S. v. Aguwa, 123 F.3d 418, 420 (6th Cir. 1997). Such questioning is a permissible attack on a witness's credibility. Id.

In addition, the prosecutor's isolated reference to "Mr. Fishman's witnesses" is insufficient to rise to the level of prosecutorial misconduct. It was an isolated

statement and did not compromise the fairness of the trial.

3.

Finally, Petitioner argues that the prosecutor commented on Petitioner's exercise of his right to remain silent and not to testify and shifted the burden of proof.

First, Petitioner points to the prosecution's cross-examination of defense witness Janard Thomas. Thomas testified that he was hit on the head with a bottle while at the party, and that his cousin, Petitioner, saw him get struck on the head. The prosecutor asked whether Thomas ever asked police to prosecute the person who struck him, asked Petitioner to inform police who hit him, or told police Petitioner could identify the person who struck him.

A defendant's Fifth Amendment right against self-incrimination protects him from the prosecution's using the exercise of his right to silence after to his detriment at trial, unless it is used for the limited purpose of impeachment. Gall v. Parker, 231 F.3d 265, 311 (6th Cir. 2001), *citing* Doyle v. Ohio, 426 U.S. 610, 618 (1976). The Sixth Circuit Court of Appeals has held that:

> While direct comments about a decision to remain silent or not to testify are clearly prohibited, indirect comments require a more probing analysis. . . . Such comments warrant reversal only when they are "manifestly intended by the prosecutor as a comment on the

> defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure to the accused to testify." Bagby v. Sowders, 894 F.2d 792, 797-98 (6th Cir. 1990). A court should not find manifest intent from such comments if some other explanation for the prosecutor's remarks is equally plausible. . . . This occurs, for instance, when the comment is a "fair response to a claim made by defendant or his counsel." United States v. Robinson, 485 U.S. 25, 32 (1988).

Id. (internal citations omitted).

The cross-examination of Thomas focused upon Thomas's failure to contact police or desire to prosecute the person who assaulted him. While there is a brief and limited reference to the possibility of Petitioner talking with police, when read in context, it is equally plausible that the question was a comment on Thomas's credibility and not on Petitioner's lack of contact with police. Therefore, the prosecutor's cross-examination was not an improper comment on Petitioner's right to remain silent.

Petitioner apparently argues that the reference to "uncontroverted" testimony in his closing argument was a reference to Petitioner's failure to testify and refute the testimony. The Court finds that the prosecutor's reference to uncontroverted testimony was not a reference to Petitioner's failure to take the stand. It was simply the prosecutor's characterization of the

strength of the evidence presented and the defense's failure to present witnesses who effectively countered the prosecutions' witnesses. *See* Shaffer v. Boone, 3 Fed. Appx. 675, 684 (10th Cir. 2001) (holding that jury would not interpret prosecutor's reference to uncontroverted testimony to be a comment on defendant's failure to testify; instead, jury likely would view it as a comment on the strength of the evidence against defendant).

In addition, Petitioner argues that the prosecutor's argument that there is no explanation for why a loaded clip was found in Petitioner's house improperly shifted the burden of proof to Petitioner and commented on his failure to testify. The Court finds that the argument simply asked the jury to make a reasonable inference based upon the evidence presented and was not a comment on Petitioner's decision not to testify.

C. Trial Judge's Statement to Jury Regarding Missing Witness

Petitioner argues that his right to due process was violated when the trial court informed the jury that the prosecution's only eyewitness was unavailable because he was deceased. Petitioner maintains that this information, coupled with Larry Lewis's testimony, served to invite speculation by the jury as to the cause of the witness's death which would cause the jury to be fearful.

Larry Lewis, a witness injured in the shooting, testified as follows, in response to a question regarding whether he still suffers pain or injuries as a result of being shot:

> Just mental pain to continue to relive this night over and over again for no reason at all. I don't even know why they shot me, why it even started. I never knew none of these people, but I just know my friends are dead.

Tr., Vol. II., p 54-55.

The Michigan Court of Appeals held that the trial court's instruction did not prejudice Petitioner:

> When the trial court informed the jury that Richards was deceased, it also instructed the jurors "to make no inferences or draw any conclusions from that circumstance." Jurors are presumed to understand and follow the trial court's instructions. People v. Graves, 458 Mich. 476, 486; 581 N.W.2d 229 (1998). Moreover, the trial court's use of the innocuous term "deceased" in reference to Richards was not calculated to convey that his death was attributable to a homicide, or that it was connected to defendant. The statement did not allow the jury to infer that Richards likely was murdered, or that defendant was involved in his death. Similarly, Lewis' comment about his friends being dead was too fleeting and vague to be deemed prejudicial to defendant.

Johnson, slip op. at 6.

The Court finds that the state court's resolution of this claim was not contrary to or an unreasonable application fo (sic) Supreme Court precedent.

D. Alleged Ineffective Assistance of Counsel

Petitioner argues that his trial attorney was ineffective in the following ways: (i) failed to object to the closing of the courtroom to the public, (ii) erred in called witnesses Janard Thomas and Letrulia Johnson; (iii) opened the door for testimony on fear; (iv) failed to object to prosecutorial misconduct; and (v) failed to call an exculpatory eyewitness.

As an initial matter, Petitioner requests an evidentiary hearing on his claims of ineffective assistance of counsel. Petitioner appears to have been diligent in seeking an evidentiary hearing in state court. He filed a request for an evidentiary hearing in state court, which was denied. He also sought remand for an evidentiary hearing in both state appellate courts. Both state appellate courts denied his request for an evidentiary hearing. Even when a petitioner is diligent in requesting an evidentiary hearing, however, a federal court on habeas review is required to hold a hearing "only if the petitioner can demonstrate that (1) the grounds he alleges are sufficient to secure his release from custody, (2) relevant facts are in dispute, and (3) the state court did not provide a full and fair evidentiary hearing." Washington v. Renico, 455 F.3d 722, 731 n.4 (6th Cir. 2006). As discussed below, none of Petitioner's claims allege grounds sufficient to secure his release from custody. Accordingly, the Court finds an evidentiary hearing unnecessary.

To establish that he received ineffective assistance of counsel, a petitioner must show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner may show that counsel's performance was deficient by establishing that counsel's performance was "outside the wide range of professionally competent assistance." Id. at 689. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[T]he focus should be on whether the result of the trial was 'fundamentally unfair or unreliable.'" Tinsley v. Million, 399 F.3d 796, 802 (6th Cir. 2005), *quoting* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

1.

First, Petitioner alleges that his attorney was ineffective in failing to object to the closing of the courtroom to the public for the testimony of three witnesses. The Michigan Court of Appeals held that, because the closure of the courtroom was justified under the circumstances, counsel was not ineffective in failing to object to the closure. Johnson, slip op. at 7. As discussed above, this Court held that the decision to close the courtroom for a limited time was not an unreasonable application of Waller. Therefore, the

Court finds that Petitioner has failed to establish that the failure to object to the closure fell "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 689.

2.

Petitioner argues that defense counsel erred in calling witnesses Janard Thomas and Letrulia Johnson because both witnesses provided damaging testimony. Both Thomas and Johnson testified that they observed Petitioner get hit in the back with a chair. Petitioner argues that this testimony ascribed a motive to Petitioner for the shooting.

The Michigan Court of Appeals held that counsel was not ineffective in calling these witnesses. The court observed that the testimony provided only "negligible" evidence of motive and that their testimony provided some evidence favorable to the defense. Johnson, slip op. at 7.

The Court has reviewed Thomas's and Letrulia Johnson's testimony and finds that both witnesses gave exculpatory testimony. For example, Thomas testified that he and Petitioner helped each other from the club. Thomas was bleeding from a head wound. Petitioner drove him to Thomas's mother's home for help. Thomas testified that Petitioner was with him the entire time and that they left the scene before any gunshots were fired. Therefore, it was reasonable trial strategy for counsel to present a witness who testified that Petitioner was not the shooter.

Letrulia Johnson testified that she was at the club on the night of the shooting. When the fighting

broke out, she and a female cousin headed to the door. She observed Petitioner, who is her cousin, being hit in the back with a chair and Thomas being hit on the head with a bottle. Letrulia Johnson and her female cousin then exited the building and walked to a vehicle. As they were trying to open the vehicle, they heard gunshots. Johnson's testimony corroborated Thomas's and was, therefore, useful for that purpose. The Michigan Court of Appeals' decision that trial counsel's decision to call Johnson and Thomas was not ineffective assistance is not contrary to or an unreasonable application of Strickland.

3.

Petitioner argues that his attorney was ineffective when he opened the door to testimony regarding a witness Damon Ramsuer's fear of testifying. As discussed in section V.B.1 above, Ramsuer's reluctance to testify became the subject of re-cross-examination after defense counsel opened the door to such testimony by asking Ramsuer the following question: "[I]f you had seen who fired shots that might have killed Carlos Davis, there's no reason for you not to have said that, was there?" Tr., Vol. II, p. 97. This question opened the door for the prosecutor to question Ramsuer regarding his reluctance to testify. Petitioner admits that "nothing damaging emerged on re-direct," but, nevertheless, argues that the prosecution's questions and reference to Ramsuer's reluctance to testify in closing argument prejudiced Petitioner because it implied that he had someone kill the witness Robert Richards and that Ramsuer feared the same would happen to him if he testified against Petitioner.

The Michigan Court of Appeals held that counsel's representation in this regard was not ineffective, stating, in pertinent part:

> By focusing on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

Johnson, slip op. at 8.

The Court finds that the court of appeals analysis was not contrary to or an unreasonable application of Strickland. As the state court observed,

even absent defense counsel's question, the jury would have wondered why Ramsuer's testimony changed. Defense counsel's question gave Ramsuer an opportunity to tout the truthfulness of his trial testimony rather than his preliminary examination testimony. Defense counsel's attempt to put a positive spin on a damaging witness was not ineffective.

4.

Petitioner next argues that his trial attorney was ineffective in failing to object to various instances of prosecutorial misconduct. This Court has determined that Petitioner has not shown that the prosecutor engaged in misconduct. Therefore, his attorney was not ineffective in failing to object to the prosecutor's conduct.

5.

Finally, Petitioner argues that counsel was ineffective in failing to call an exculpatory witness, Jason Hodgson.

The Michigan Court of Appeals held that the failure to call Hodgson did not prejudice the defense, reasoning, in pertinent part:

> Hodgson told the police that he was driving past the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have

> sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs.
>
> Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was wiling and able to testify at trial consistent with his statement. Consequently, he has failed to dhow (sic) either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

Johnson, slip op. at 8.

Given that some evidence was presented of two shooters and that Richards identified Petitioner as the shooter, Petitioner has failed to show that the state court's conclusion was contrary to or an unreasonable application of Strickland. Moreover, given the testimony of Richards and Ramsuer's statement to police, Petitioner has failed to show a reasonable probability that the result of the proceeding would

have been different had Hodgson been called as a witness.

E. Identification Procedure

Petitioner next argues that his right to due process was violated because the pretrial identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377 (1968). The identification at issue is that made by Robert Richards, the witness who was killed prior to trial. The trial court granted a motion for evidentiary hearing on this issue, but Richards was killed prior to the scheduled hearing.

"A conviction based on identification testimony that follows a pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994). A court must undertake a two-step analysis to determine the validity of a pretrial identification. First, the court must determine whether the procedure was unduly suggestive. If the court finds that the procedure was unduly suggestive, the court must then "evaluate the totality of the circumstances to determine whether the identification was nevertheless reliable." Id. Where an in-court identification was potentially impacted by an impermissibly suggestive out-of-court lineup, the governing test is whether "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Neil v. Biggers, 409 U.S. 188, 199 (1972).

Police Detective Szymanski obtained photographs of people taken at the party. On March 3, 2002, Detective Szymanski took the photographs to the hospitalized gunshot victims, Mathis and Lewis. After visiting his friend, Lewis, in the hospital, Robert Richards contacted Detective Szymanski and gave him a description of the clothing worn by the shooter. Richards subsequently went to the police station and viewed a group photograph containing men and women. He identified Petitioner as the shooter. Petitioner argues that, because the clothing worn by Petitioner in the photograph was similar to that described by Richards in his telephone call with Szymanski, the Detective should have added other photographs to the array containing men whose facial characteristics matched those of Petitioner. Petitioner maintains that the procedure used was equivalent to a one-man lineup.

The Michigan Court of Appeals denied Petitioner's claims, stating, in pertinent part:

> By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for

purposes unrelated to a criminal investigation.

The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if they have detained the correct person.

* * *

. . . The police used the photographs to determine which person from a large pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve

> as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

Johnson, slip op. at 9-10.

The Court finds the Michigan Court of Appeals' analogy to an on-the-scene identification helpful. The Sixth Circuit Court of Appeals has recognized the value of show-up procedures, finding that conducting a showup is "consistent with legitimate law enforcement purposes," including allowing identification before a suspect has had the opportunity to alter his appearance. Drew v. Parker, 244 Fed. App'x 23, 28 (6th Cir. 2007). The Court concludes that the state court's determination that the identification procedure was not impermissibly suggestive was not contrary to or an unreasonable application of Supreme Court precedent.

Moreover, even assuming that the identification procedure was impermissibly suggestive, Petitioner has failed to show the identification at the preliminary examination was not reliable. Richards testified that

he had the opportunity to see the shooter from twenty feet away, and that, although it was dark outside, the lighting was sufficient for him to discern many details of the shooter's clothing, including the color of his hat and type of shoes he wore. Considering all of these factors, this Court concludes that the state court's determination that the identification was reliable was not contrary to or an unreasonable application of Supreme Court precedent.

In addition, there is no constitutional right to counsel at a photographic array. Van v. Jones, 475 F.3d 292, 311 (6th Cir. 2007); United States v. Ash, 413 U.S. 300 (1973),. Therefore, Petitioner fails to assert a constitutional violation with respect to this claim.

F. Sentencing Claim

Finally, Petitioner argues that he is entitled to habeas corpus relief because the trial court increased his sentence in reliance upon facts not found by a jury in violation of the Sixth and Fourteenth Amendments. *See* Blakely v. Washington, 543 U.S. 296, 303-05 (2004) (state trial court's action in sentencing defendant beyond the statutory maximum of the standard range for his offense based upon judicial finding of deliberate cruelty violated Sixth Amendment right to trial by jury).

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Michigan has an indeterminate sentencing system for most crimes,

including causing the death of another person while operating a motor vehicle under the influence of intoxicants. The maximum term of imprisonment is set by law. Mich. Comp. Laws § 769.8(1); *see also* People v. Drohan, 475 Mich. 140, 160-61 (2006). In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court addressed indeterminate sentencing systems and held that such systems do not violate the Sixth Amendment. The Court explained:

> [The Sixth Amendment] limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home

> unarmed is entitled to no more than a 10 year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 308-09.

Judicial factfinding may not be used to impose a sentence "beyond the prescribed statutory maximum." Apprendi, 530 U.S. at 490. Under Michigan law, the statutory maximum for second-degree murder, Mich. Comp. Laws § 750.317, and assault with intent to commit murder, Mich. Comp. Laws § 750.83, is life imprisonment. The sentencing court did not impose a sentence beyond the statutory maximum. Therefore, the sentencing scheme did not run afoul of the Sixth Amendment. Because Blakely does not apply to indeterminate sentencing schemes like the one utilized in Michigan, the trial court's sentence did not violate Petitioner's constitutional rights. *See* Tironi v. Birkett, No. 06-1557, 2007 WL 3226198, * 1 (6th Cir. Oct. 26, 2007). ("Blakely does not apply to Michigan's indeterminate sentencing scheme."). Mumer v. Vasbinder, 2007 WL 1469419, * 4 (E.D. Mich. May 21, 2007); Chatman v. Lafler, 2007 WL 1308677, *2 (E.D. Mich. May 3, 2007); Jones v. Bergh, 2006 WL 1007602, *1-2 (E.D. Mich. April 17, 2006); George v. Burt, 2006 WL 156396, *5 (E.D. Mich. Jan. 20, 2006); Walton v. McKee, 2005 WL 1343060, *3 (E.D. Mich. June 1, 2005). Petitioner has thus failed to state a claim upon which habeas relief may be granted.

VI. Conclusion

For the reasons stated, Petitioner has failed to show that she is incarcerated in violation of the

Constitution or laws of the United States. Accordingly, **IT IS ORDERED** that the petition for a writ of habeas corpus is **DENIED**.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

Dated: February 12, 2008

I hereby certify that a copy of the foregoing document was served upon counsel of record by electronic and/or first-class mail.
s/Carol Mullins
Case Manager to Chief Judge Friedman

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 24, 2004

v

No. 247227
Wayne Circuit Court
LC No. 02-012133-01

WILLIAM DESHUN JOHNSON,
Defendant-Appellant.

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 75.227b. He was sentenced to concurrent prison terms of thirty-five to sixty years for the murder conviction, and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony firearm conviction. We affirm.

Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and

several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

Defendant claims that the trial court violated his right to a public trial. We disagree.

At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious

circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

Because defense counsel did not object to the exclusion of spectators, this issue is not preserved and, therefore, is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. Id. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* The plain error rule extends to unpreserved claims of both constitutional and nonconstitutional error. *Id.* at 764. Both the federal and state constitution guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, the right to complain about an order of exclusion is waived where the defendant consents or fails to object. *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981); *People v Sylvester Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979). In the instant case, defendant expressly waived his right by

assenting to the trial court's decision to close the courtroom during the three witnesses' testimony.

Moreover, the right to a public trial is not absolute, and, under certain circumstances, higher interests may take precedence. In *Kline, supra* at 169, this Court, quoting *Waller v Georgia*, 467 US 39, 45; 104 S Ct 2210; 81 L Ed 2d 31 (1984), and *Press-Enterprise Co v Superior Court of California, Riverside Co*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984), observed:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

The Court in *Kline* held that a trial court must satisfy four requirements before ordering a total closure.[1] These are:

> (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Waller, supra*], quoting *Press-Enterprise Co, supra*. [*Kline, supra* at 169.]

Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). The closure was not broader than necessary to protect these witnesses'

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[1] The *Kline* Court distinguished between total closures and partial closures, and noted that a partial closure requires a showing of only a substantial, rather than a compelling reason. *Id.* at 179, citing *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). Although the closure affected only three witnesses in the instant case, the fact that all spectators, including the defendant's family members, were excluded renders the closure total. See *Davis v Reynolds*, 890 F2d 1105, 1108-1110 (CA 10, 1989).

safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in *Kline* restricts courtroom closures to circumstances involving very young witnesses or direct threats. We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety.

Defendant also contends that his waiver was not knowingly or intelligently made because the trial court did not advise him of his rights. He analogizes to the requirements for accepting a defendant's waiver of the right to counsel or to a jury trial, and to the requirements surrounding guilty pleas. Defendant's argument is inconsistent with *Gratton*, *supra* at 478, wherein this Court held that the right to a public trial may be waived not only affirmatively, but also by a failure to object. Defendant cites no authority supporting his argument that a right to a public trial warrants the same safeguards as the right to counsel, a jury, or a trial, and therefore waives this argument. See *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

In sum, we conclude that the trial court did not plainly err when it ordered a brief closure of the trial to protect the safety of three witnesses. Further,

defendant has not shown that the court's decision affected his substantial rights.

II

Defendant raises several claims of prosecutorial misconduct. A defendant must preserve his claim of prosecutorial misconduct by making a timely and specific objection. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Review of unpreserved claims of misconduct is limited to whether the alleged misconduct constituted plain error affecting the defendant's substantial rights. *Id.*

A

Defendant claims that the prosecutor denigrated his counsel's veracity by suggesting that defense counsel concocted defense witnesses' testimony. The prosecutor's argument referred to seven defense witnesses, mostly related to defendant, who testified that they were at the party with defendant, but who did not contact the police or come forward with their information until defense counsel contacted them shortly before trial. Trial counsel did not object to the prosecutor's argument, so our review is for plain error.

A prosecutor may not question a defense counsel's veracity, or suggest that defense counsel intentionally sought to mislead the jury. *People v*

Watson, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). The prosecutor may, however, point out the deficiencies in a defendant's case, and argue from the facts that a witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). The prosecutor's arguments here were not improper under these principles. The defense witnesses' failure to come forward sooner, following a violent event that led to serious criminal charges against a relative, cast doubt on their credibility and undermined the defense. Defendant has failed to establish plain error.

B

Defendant claims that the prosecutor repeatedly injected the element of fear in the trial; specifically, when: (1) he commented during opening statement that Richards was not available to testify, and that the jury would learn more about this during the trial; (2) he commented during closing argument that Lewis was still afraid; and (3) he suggested that Ramsuer changed his story and tried to avoid testifying because he was afraid. Prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999).

Defendant did not object to these specific incidents, but he moved before trial to preclude the prosecutor from questioning witnesses about their fear. The trial court agreed. Even if defendant's general objection can be viewed as sufficient to preserve his claims of prosecutorial misconduct, the challenged

remarks did not deprive him of a fair and impartial trial. The remark about Richards' unavailability was too vague to suggest to jurors that Richards had been killed, or that his death was related to the trial. Only a person fully informed of the circumstances of Richards' death—and the jurors were not—could give the statement such an interpretation. The comment about Lewis' fear was based directly on Lewis' testimony that he still felt "mental pain to continue to relive this night over and over again for no reason at all." The prosecutor's remark did not invoke the element of fear; the prosecutor merely observed that Lewis, like other victims of violent crimes, continued to feel anguish long after the event.

We also find no improper invocation of fear or emotion where the prosecutor asked the jury to "[t]hink about why [Ramsuer] wouldn't [identify defendant] in court" and to "[t]hink about the reasons why we had to lock him up to bring him to court to tell on his own friend, Mr. Davis, how he was murdered." Ramsuer was an important witness who denied making prior inculpatory statements or previously identifying defendant as the shooter. Asking the jurors to draw reasonable inferences as to why he would do so was highly relevant to the issue of whether Ramsuer's trial testimony was credible. The prosecutor's argument was not made to appeal to the jurors' emotions, nor did it ask the jurors to convict defendant for any reason other than that the evidence established his guilt.

C

Defendant claims that the prosecutor improperly shifted the burden of proof to the defense, and

commented on defendant's right to remain silent, during the cross-examination of a defense witness, Janard Thomas, and again during closing argument. We review these claims for plain error, inasmuch as defendant did not object at trial.

The prosecutor may not comment on a defendant's failure to testify, because such an argument undermines the presumption of innocence and the defendant's right against compelled self-incrimination. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor also may not suggest that a defendant is obligated to prove something, because such an argument tends to shift the burden of proof. *Id.* at 113-115. However, the prosecutor may argue from the facts that a defendant's positions are not worthy of belief. *Howard*, *supra* at 548. Additionally, the prosecutor's arguments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Janard Thomas testified that he was hit in the head with a bottle, and defendant was hit in the back with a chair during the fight. Thomas claimed that defendant then helped him up from the floor, and the two fled from the hall and drove home. On cross-examination, the prosecutor questioned Thomas about his and defendant's failure to report the assaults to the police, though defendant might have been able to identify the person who hit Thomas. These questions did not implicate defendant's right to remain silent, but instead highlighted a weakness in Thomas' testimony.

Defendant also objects to the prosecutor's statement during closing argument that Richards' testimony about seeing defendant fire the gun repeatedly was uncontroverted. A prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Here, Richards' testimony was uncontroverted. Denise Chatman testified that she saw another person fire a gun, but she also testified that there seemed to be two shooters. Because persons other than defendant could have disputed Richards' testimony, but did not, the prosecutor's remark was proper.

Defendant's final claim of prosecutorial misconduct challenges the prosecutor's statement that there was no explanation for why defendant would possess a loaded magazine, but no gun. This was not a burden-shifting argument, but rather a comment on the evidence. The argument did not focus on defendant's failure to explain the evidence; instead, it implied that the evidence was inculpatory because a likely explanation was that defendant disposed of the gun.

In sum, the prosecutor did not make improper references to defendant's right to remain silent, or make improper attempts to shift the burden of proof in any of these alleged instances of misconduct. We therefore find no plain error.

III

Defendant argues that he was unfairly prejudiced when the trial court informed the jury that Richards' preliminary examination testimony would be read because Richards was deceased. Defendant opines that the jury must have realized that Richards was murdered, and inferred that his murder was connected to defendant's case. He argues that he was further prejudiced when Lewis stated, "My friends are dead," which could have signaled to the jury that defendant was involved in the murder of others, including Richards.[2] Defendant preserved this issue by twice requesting the trial court to indicate only that Richards was "unavailable." Because this issue is in the nature of an evidentiary issue, we review the trial court's decision for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

We find no abuse of discretion. When the trial court informed the jury that Richards was deceased, it also instructed the jurors "to make no inferences or draw any conclusions from that circumstance." Jurors are presumed to understand and follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the trial court's use of the innocuous term "deceased" in reference to Richards was not calculated to convey that his death was attributable to a homicide, or that it was connected to defendant. The statement did not allow the jury to infer that Richards likely was murdered, or that

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[2] Defendant unsuccessfully moved for a mistrial based on Lewis' statement. He does not challenge the denial of his request for a mistrial on appeal.

defendant was involved in his death. Similarly, Lewis' comment about his friends being dead was too fleeting and vague to be deemed prejudicial to defendant.

IV

Defendant raises several claims of ineffective assistance of counsel. Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *Rodriguez*, *supra* at 38. Here, defendant moved in the trial court for a *Ginther* hearing, but the trial court denied the motion.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

A

First, defendant contends that counsel was deficient for agreeing to the closure of the courtroom during the testimony of three prosecution witnesses. As discussed in part I above, the trial court's decision to exclude spectators was justified under the circumstances. Accordingly, trial counsel's

acquiescence was neither objectively unreasonable, nor outcome-determinative.

B

Next, defendant claims that trial counsel was deficient for calling Janard Thomas and Letrulia Johnson as defense witnesses. Thomas and Johnson both testified that they saw defendant get hit with a chair during the fight in the hall. Defendant maintains that this testimony helped the prosecution establish that defendant had a motive to shoot Lewis, Mathis, and Davis. Lewis had testified that he swung a folding chair at the crowd of people attacking Robinson, and that he carried the chair out of the hall with him for protection. The prosecutor asked during closing argument whether it was a coincidence that defendant shot the person who held the chair.

Defendant has not overcome the presumption that calling Thomas and Letrulia was sound trial strategy. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). All of the witnesses who described the fight portrayed the eruption as a donnybrook, in which numerous persons were pushed and hit with chairs and bottles. Letrulia testified that defendant was "down" after being hit with the chair, suggesting that he could not have left the hall in time to commit the shooting. Thomas' testimony indicated that defendant took Thomas home and helped dress a head wound he sustained when he was hit with a bottle. To the extent being hit by a chair could be viewed as a motive for this shooting, defendant was only one of several persons with that motive. Also, the jury could have inferred that defendant was struck during the

fight even without the witnesses' testimony. Under these circumstances, Thomas' and Letrulia Johnson's testimony provided only negligible evidence of a motive, and their testimony cannot be characterized as only harming defendant's interests.

C

Defendant claims that trial counsel was ineffective because he opened the door to allowing the prosecutor to question Ramsuer about his fear of defendant. At the start of trial, defense counsel asked the trial court to preclude the prosecutor from questioning witnesses about their fear of defendant. The trial court agreed, unless the prosecutor could show some special need to explore a witness' fear. Subsequently, during defense counsel's cross-examination of Ramsuer, Ramsuer reiterated that he never told the police that he saw the shooter and never identified defendant as the shooter from the party photographs, notwithstanding the statement he signed. Defense counsel then elicited that Davis was Ramsuer's friend, and that Ramsuer had no reason not to reveal who killed his friend, if he knew.

The trial court agreed with the prosecutor that trial counsel's questions opened the door to allow the prosecutor to elicit testimony that Ramsuer was fearful of defendant. On redirect examination, the prosecutor did not specifically question Ramsuer about his fear, but elicited Ramsuer's admission that he had no reason to lie to the police in the investigation of his friend's murder, and reviewed Ramsuer's subsequent lack of cooperation throughout the case.

By focusing only on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to the police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

D

Defendant claims that counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed in part II above. Because we have already concluded that none of these claims constituted plain error, counsel's failure to object did not constitute ineffective assistance.

E

Defendant contends that trial counsel was ineffective for failing to call Jason Hodgson to testify. Defendant raised this issue in his motion for a new trial. Hodgson told the police that he was driving past

the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have a sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs. Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was willing and able to testify at trial consistent with his statement. Consequently, he has failed to show either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

V

Defendant challenges the trial court's failure to hold an evidentiary hearing on his claim that the police used an impermissibly suggestive procedure when Richards identified him from a group photograph taken by a hired photographer during the party before the fight broke out. Defendant moved to suppress the identification, and for an evidentiary hearing on this claim. Although the trial court did not believe that an evidentiary hearing was warranted, it agreed to hold a hearing and scheduled it for December 20, 2002. For

reasons that are not clear from the record, the hearing was never held.

It is not necessary to determine why a hearing was never held, or to address the prosecution's claim that defendant effectively abandoned the issue by failing to renew his motion for a hearing. The record is sufficient to review this issue on the merits. The police officer's use of the photographs for identification purposes did not trigger concerns about unduly suggestive procedures.

An unduly suggestive identification procedure that is conducive to "irreparable misidentification" constitutes a denial of due process. *People v Kurylczyk*, 443 Mich 289, 302303; 505 NW2d 528 (1993); *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness identifies a defendant through an impermissibly suggestive identification procedure, evidence concerning the identification is inadmissible at trial unless an independent basis for an in-court identification can be established "that is untainted by the suggestive pretrial procedure." *Kurylczyk, supra* at 303; *Williams, supra* at 542-543. Our Supreme Court stated in *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998):

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *Simmons v United States*, 390 US 377,

> 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness is told or believes that the police have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *Id.*

In *Gray*, the Court further emphasized that "the exhibition of a single photograph 'is one of the most suggestive photographic identification procedures that can be used.'" *Id.*, quoting Sobel, *Eyewitness Identification* (2d ed), § 5.3(f), p 5-42.

The use of the party photographs in the instant case did not trigger the suggestiveness concerns in *Gray* and *Kurylczyk*. By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for purposes unrelated to a criminal investigation.

The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if

they have detained the correct person. This Court stated in *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997):

> Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. . . . Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability. [Citations omitted.]

In *People v Libbett*, 251 Mich App 353, 360-363; 650 NW2d 407 (2002), this Court approved an on-the-scene identification, despite a two-hour lapse between the crime and the identification, where there "was nothing in the record to suggest that the police made any suggestive comments at the identification or that the police were acting for reasons other than to determine 'whether there [was] a reasonable likelihood that the suspect [was] connected with the crime and subject to arrest, or merely an unfortunate victim of circumstances.'" *Id.*, quoting *Winters*, *supra* at 728.

The use of the party photographs in the instant case do not precisely fit the on-the-scene identification scenario of *Winters* and *Libbett*, but the analysis in these cases is apt nonetheless. The police used the photographs to determine which person from a large

pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

VI

Defendant challenges the sentencing court's scoring of the sentencing guidelines, and its decision to exceed the guidelines by forty-five months with respect to his sentence for second degree murder.

Defendant objected to the sentencing court's scoring of offense variables 4, 5 and 9 at sentencing; therefore, these issues are preserved. MCL 769.34(10); MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable (OV) 4, psychological injury to a victim, assigns a score of ten points where the victim sustains "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). The sentencing court is directed to score ten points "if the serious psychological injury may require professional treatment," but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Defendant received ten points for this variable. We conclude that the evidence supported the score of ten points because Lewis testified that he was still suffering "mental pain" and continued "to relive this night over and over again."

OV 5 assigns fifteen points where the victim's family member suffers "[s]erious psychological injury requiring professional treatment." MCL 777.35(1)(a). As with OV 4, the fact that treatment has not been sought is not conclusive. MCL 777.35(2). Ruby Davis, Davis' "adopted aunt," stated at the sentencing hearing that Davis' mother and other family members were "a nervous wreck" and unable to go about their everyday lives. His mother was taking medication, she could not

sleep, and she was afraid to leave the house. This evidence was sufficient to support a score of fifteen points for OV 5.

The sentencing court scored twenty-five points for OV 9, number of victims, which is appropriate where there are ten or more victims. MCL 777.39(b). Each person who is placed in danger of injury or loss of life is considered a victim for purposes of scoring this variable. MCL 777.39(2)(b). The sentencing court reasoned that defendant randomly fired into a crowd of at least ten people, all of whom could be considered victims of the assault. We agree that the evidence was sufficient to support the trial court's score. Several witnesses testified that there were at least one hundred persons in the hall, and that most of them exited the hall during the fight. This would have placed most of them outside the hall at the time of the shooting. It is reasonable to infer, as the sentencing court did, that the randomness of the shooting placed all of them in danger of injury, and thus they were victims of the shooting spree.

The guidelines minimum sentence range for defendant's second-degree murder conviction was 225 to 375 months or life in prison. The sentencing court commented, however, that the guidelines did not "look at and score the impact of that kind of offense where someone shoots other persons in this particular way." The court explained:

> Here, I think that what bothers me about this case and so many that I see like this, and you know this happens all the time: Someone is upset, angered because of

> something that happened; and they want to take the ultimate revenge in that for whatever reason, whether it be bad judgment or just wanting to establish one's self in terms of what their reputation may be, whatever it may be.

The sentencing court commented that defendant shot randomly into a large crowd out of anger after being hit with a chair in the brawl, and killed a person who had done nothing to victimize defendant. The court asserted that these circumstances warranted an upward departure from the guidelines, and sentenced defendant to thirty-five to sixty years in prison for second-degree murder. The minimum sentence exceeded the guidelines by three years and nine months.

MCL 769.34 requires a sentencing court to sentence a defendant within the guidelines range, but allows for departures from the guidelines for substantial and compelling reasons. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich App 247, 255; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing court must articulate its reasons for the departure on the record, and its reasons must be "objective and verifiable." MCL 769.34(3); *Babcock*, *supra* at 257-259. The sentencing court may not base a departure on a factor already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the record that the factor has been given inadequate or disproportionate weight. *Id.* at 258 n 12. Departures from the guidelines are appropriate where

a sentence within the guidelines range is not proportionate to the seriousness of the offense. *Id.* at 264. The determination whether a particular factor is objective and verifiable is reviewed as a matter of law, whereas the determination that objective and verifiable factors constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 264-265.

We find no error in the court's upward departure. In explaining why a departure from the guidelines was warranted, the court stated that the guidelines did not account for the depravity displayed by defendant's conduct of unleashing deadly force against an entire crowd of people merely because he was angry that one person had hit him with a chair. Contrary to defendant's argument, these circumstances were not adequately accounted for by the guidelines. Neither OV 9, multiple victims, nor OV 6, intent to kill, adequately addressed the circumstance of defendant avenging a comparatively minor incident with a shooting spree against dozens of persons. This reason is also objective and verifiable, and consistent with the evidence. The court did not abuse its discretion in determining that these circumstances presented a substantial and compelling reason to depart from the guidelines. *Id.* at 264.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad

Supreme Court, U.S.
FILED
JUN 28 2010
OFFICE OF THE CLERK

No. 09-1342

In The
Supreme Court Of The United States

JERI-ANN SHERRY, Warden,

Petitioner,

-vs-

WILLIAM D. JOHNSON,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX IN SUPPORT OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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No. 08-1322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 28, 2010
LEONARD GREEN, Clerk

WILLIAM JOHNSON,

Petitioner-Appellant,

v.

JERI -ANN SHERRY, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: COLE, CLAY, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Kethledge would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0398p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM JOHNSON,
Petitioner-Appellant,

v.

JERI ANN SHERRY, Warden,
Respondent-Appellee.

No. 08-1322

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-11214—Bernard A. Friedman, District Judge.

Argued: ~~June 10, 2009~~ August 7, 2009 ✓

Decided and Filed: November 13, 2009

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Andrew L. Shirvell, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Brian O. Neill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

CLAY, J., delivered the opinion of the court, in which COLE, J., joined. KETHLEDGE, J. (pp. 12–15), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Petitioner William Johnson ("Johnson") appeals the district court's judgment denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On appeal, he argues that the state violated his Sixth Amendment right to a public trial when it excluded the public from the courtroom during portions of his jury trial and that

his Sixth Amendment right to effective assistance of counsel was violated when his trial attorney failed to object to the closure. For the reasons that follow, we **VACATE** the judgment of the district court and **REMAND** for an evidentiary hearing.

I. BACKGROUND

A. Procedural History

On January 10, 2003, a jury convicted Johnson of one count of second degree murder in violation of Michigan Compiled Laws ("MCL") § 750.317; three counts of assault with intent to commit murder in violation of MCL § 750.83; and possession of a firearm during the commission of a felony in violation of MCL § 750.227b. Johnson was sentenced to concurrent prison terms of thirty-five to sixty years for the murder conviction and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony firearm conviction.

Johnson timely filed a motion for a new trial and requested an evidentiary hearing, but his motion was denied. His convictions were affirmed on direct appeal, and the Michigan Supreme Court denied his application for leave to appeal. Johnson timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan and his petition was denied on February 12, 2008. Johnson timely filed a notice of appeal, along with a request for a certificate of appealability ("COA") on numerous issues. The district court granted a partial COA, certifying Johnson's claims that he was denied his right to a public trial and that his attorney was ineffective in failing to object to the closure of the courtroom. This Court entered an order stating that only the claims certified by the district court would be heard.

B. Substantive Facts

The Michigan Court of Appeals outlined the facts underlying Johnson's convictions as follows:

> Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall

> after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.
>
> Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified [Johnson] at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read [to the jury] at trial.
>
> The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement. . . .
>
> At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

(R. at 85-86.)

Following his conviction, Johnson filed a motion for a new trial claiming denial of the right to a public trial. In denying the motion, the trial court noted that counsel agreed to the suggested closure and that counsel asked members of Johnson's family not to appear in the courtroom until after 11:00 a.m. the following day. After exhausting this claim and an ineffective assistance of counsel claim in the state courts, Johnson filed a petition for habeas relief in federal district court pursuant to 28 U.S.C. § 2254. Among other claims, Johnson claimed that his right to a public trial was violated and that counsel was ineffective for failing to assert that right. In the district court's opinion denying habeas relief, the court held that Johnson's claim was procedurally defaulted, providing the following explanation:

> [T]n this case, Respondent's procedural default argument is not based upon defendant's failure to object, it is based upon his consent, through counsel, to the courtroom closure. Respondent argues that this acquiescence constituted a waiver of this claim. The Court finds that Petitioner waived his right to a public trial by his acquiescence, through his attorney, to the closure.

(R. at 1602.) The district court also explained, in the alternative, that the claim would fail on the merits:

> The Court finds that the state court's conclusion was a reasonable application of *Waller*. While the trial court's findings could have been more clearly articulated on the record, it was, as observed by the Michigan Court of Appeals, a reasonable conclusion that the suspicious deaths of two witnesses had, in the trial court's opinion, sparked enough fear in three witnesses and sufficiently placed their well-being at risk to override Petitioner's right to a public trial. The trial court limited the closure to just three witnesses and ensured that the closure would not be evident to the jury. Considering these circumstances, the Court finds that the state court's application of the *Waller* factors was not unreasonable.

(R. at 1603.)

With respect to Johnson's ineffective assistance of counsel claim, the Michigan Court of Appeals concluded that "trial counsel's acquiescence was neither objectively unreasonable, nor outcome-determinative." (R. at 1148.)[1] The district court agreed, holding that because "the decision to close the courtroom for a limited time was not an unreasonable application of *Waller* . . . Petitioner has failed to establish that the failure to object to the closure fell 'outside the wide range of professionally competent assistance'".as required by *Strickland v. Washington*, 466 U.S. 668, 689.(1984). (R. at 1611.)

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[1] It is unclear what "outcome determinative" means, because, as discussed below, if the counsel's actions resulted in a closure that was unjustified or broader than necessary, prejudice would be presumed.

II. DISCUSSION

A. Standard of Review

Because Johnson filed his habeas petition in 2006, his petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). Under the AEDPA, Johnson may obtain relief only if he can show that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or that the state court relied on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). In reviewing a district court's decision to grant or deny habeas relief, this Court reviews questions of fact under a "clearly erroneous" standard and questions of law *de novo*. *Carson v. Burke*, 178 F.3d 434, 436 (6th Cir. 1999).

B. Analysis

Johnson's appeal presents two interrelated issues: (1) whether his Sixth Amendment right to a public trial was violated when the court closed the courtroom during the testimony of three prosecution witnesses; and (2) whether trial counsel was constitutionally ineffective for failing to object to the closure.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; *see also In re Oliver*, 333 U.S. 257, 278 (1948) (holding this right to be binding on the states through the due process clause of the Fourteenth Amendment). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks and citations omitted). Because of the "'great, though intangible, societal loss that flows' from closing courthouse doors," the denial of a right to a public trial is considered a structural error for which prejudice is

presumed. *Id.* at 50 n.9 (quoting *People v. Jones*, 47 N.E.2d 1335, 1340 (N.Y. 1979)). In light of these concerns, to justify the closure of a courtroom over the objections of a defendant, "the party seeking to close [a public] hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48 (applying the test set forth in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), to a Sixth Amendment public trial claim).[2]

In the instant case, the prosecution moved to close the courtroom during the testimony of three prosecution witnesses. The prosecutor informed the court that two witnesses had been killed "under very suspicious grounds" near the time of the preliminary examination and that a number of the remaining witnesses were afraid to testify at trial. (R. at 138-39.) The trial court expressed concerns regarding the closure, stating that the prosecutor was "treading on some very dangerous ground," and inquired "[w]ell, if these persons are essentially being protected . . . what is their concern about?" (R. at 138-40.) Nonetheless, defense counsel acquiesced to the closure, stating:

> Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since [the prosecution] brought it to my attention. If the Court wants to do that, [i.e., close the courtroom], we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem.

(R. at 387.) The court accepted defense counsel's position without making further inquiry or findings, and defense counsel instructed members of Johnson's family to remain outside of the courtroom during the testimony at issue.

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[2]The four-part test discussed above was first developed in *Press-Enterprise*, 464 U.S. at 510, which addressed the First Amendment right to public jury selection. The *Waller* Court adopted the test in the context of the Sixth Amendment right to a public trial, explaining that "there can be little doubt that the explicit *Sixth Amendment* right of the accused is no less protective of a public trial than the implicit *First Amendment* right of the press and public." 467 U.S. at 46 (emphasis added).

Johnson concedes that his attorney acquiesced to the closure, but argues that because the right to a public trial is a fundamental constitutional right and a structural guarantee, his attorney's statements were insufficient to constitute waiver. While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for closure is sufficient to overcome the public and media's First Amendment right to an open and public trial proceeding. *See Freytag v. Commissioner*, 501 U.S. 868, 896 (1991) ("[T]he Sixth Amendment right to a trial that is 'public,' provide[s] benefits to the entire society more important than many structural guarantees; but if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (collecting cases); *see also Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960)). Because Johnson failed to object to the closure, his claim is procedurally defaulted unless he can show cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. Here, it is undisputed that Johnson failed to make a contemporaneous objection to the closure, which is required by an "independent and adequate state procedural rule." *United States v. Frady*, 456 U.S. 152, 168 (1982). It is also evident that the last state court from which Johnson sought review invoked the state procedural rule as a basis for its decision to reject review of the claim. (*See* R. at 86 (state court of appeals stated that Johnson "expressly waived his right by assenting to the trial court's decision to close the courtroom during the three witnesses' testimony." (citations omitted).) Thus, the district

court found that Johnson's claim was denied based on an independent and adequate state procedural rule.[3]

Under these circumstances, federal habeas review of Johnson's public trial claim is barred unless Johnson can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Johnson argues that he has demonstrated cause for the default because his counsel was ineffective in failing to object to the closure of the trial. Consequently, both of Johnson's claims on appeal turn on whether his counsel was constitutionally ineffective.[4]

In order to establish ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and that "the deficient performance prejudiced [his] defense." *Strickland*, 466 U.S. at 687-88. In the instant case, we agree that defense counsel's failure to object to the closure of Johnson's trial may have fallen below an "objective standard of reasonableness" as required in *Strickland*. Courts have been clear that while the closure of a trial may be justified in certain cases, "[s]uch circumstances will be rare . . . and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45; *see also Press-Enterprise*, 464 U.S. at 510 (holding that a closure may be justified only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007) (holding that the failure to object to the courtroom

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[3] Johnson argues that the state procedural default was not an independent and adequate state ground barring subsequent federal review because Michigan courts "regularly waive contemporaneous objection defaults where the issue is perceived to concern constitutional due process rights" and that, here, the state court did so when it reached the merits of his public trial claim. (Johnson's Reply Br. 4.) However, while the state court did discuss the merits of Johnson's public trial claim, it clearly did so as an *alternative* basis for denying the claim, and the procedural default rule applies. (*See* R. at 86 ("[D]efendant expressly waived his right by assenting to the trial court's decision. . . . Moreover, the right to a public trial is not absolute . . . .")); *see also Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. . . . [R]econsideration of the federal issue on federal habeas [is curtailed] as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision.") (emphasis in original).

[4] Attorney error can only constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland*, 466 U.S. 668. *See Coleman*, 501 U.S. at 752; *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

closure for a day of jury selection deprived defendant of a substantial fair trial right). Counsel's failure to object to the closure of the courtroom during the testimony of three key prosecution witnesses, arguably the most important phase of Johnson's trial, denied Johnson a substantial fair trial right and counsel should have approached the issue with caution.

Given the absence of on-the-record findings by the trial court, it is difficult for us to discern whether it was necessary for the courtroom to be closed to all spectators for the testimony at issue. However, on the record before us, we are far from convinced that this was the "rare" circumstance where closure was justified, or that the closure was "no broader than necessary" to protect the interest advanced by the state under *Waller*, 467 U.S. at 48. While the prosecution made general allegations that two prosecution witnesses—Elvin Robinson and Robert Richards—had been murdered, Johnson stresses that another individual was charged with the stabbing of Elvin Robinson, and the prosecution offered no proof that Johnson or any member of Johnson's family was involved in the death of those individuals. *See Waller*, 467 U.S. at 48 (requiring the party seeking the closure to provide specific evidence of an overriding interest that was likely to be prejudiced). The prosecution presented no witnesses or evidence in support of the closure, and did not point to any incidents in which the witnesses at issue had been threatened or otherwise contacted by any member of Johnson's family. In fact, both the court and the prosecution acknowledged that the request was on thin or dangerous ground.[5] Notwithstanding these circumstances, defense counsel made no effort to limit the closure to less than three witnesses, or to ensure that the excluded individuals be limited to those individuals who might be perceived as a threat to the witnesses. Under these circumstances, defense counsel's acquiescence to the closure appears unjustified.[6]

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[5]The prosecutor stated that "[t]he only case law I really found deals with small children [who we]re intimidated by someone present in those cases," acknowledged that his motion was on "very thin ground," and noted that he was sure that defense counsel would have an objection to the closure. (R at 138-39.) When the prosecution requested closure, the trial court stated that the prosecutor was "treading on some very dangerous ground." (*Id.* at 138.)

[6]Johnson alleges that the family members who were excluded included four aunts, ranging from 38 to 50 years in age, and a female first cousin who was 38 years old. Johnson's Br. 7. In *In re Oliver*, 333 U.S. 257, 272 (1948), the Supreme Court explained that a defendant has a particularly compelling interest in having his family present at his trial.

To be sure, counsel's decision would be owed deference if it could be viewed as strategic, and counsel may have been privy to information of which we are unaware. *See Strickland*, 466 U.S. at 689 (explaining that a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy). For example, defense counsel may have known that Johnson's family members had a history of contact with the relevant witnesses or he may have known more about the nature of the alleged witness killings than the record revealed. However, if counsel had additional relevant information, it is not evident from the record. No court below conducted an evidentiary hearing to explore these matters, and, on the record before us, it is difficult to see how the failure to object to the closure could have been strategic. *See id; see also Owens*, 483 F.3d at 66 (remanding for an evidentiary hearing when there was no indication that counsel's failure to object to a closure was strategic). Consequently, an evidentiary hearing is warranted to determine if trial counsel's failure to object to the closure constitutes deficient performance.

If Johnson can establish that counsel's performance was deficient, he will also be required to demonstrate that he was prejudiced by the error. *See Coleman*, 501 U.S. at 750 (requiring a showing of prejudice to excuse procedural default of a claim); *Strickland*, 466 U.S. at 687 (requiring a showing of prejudice to establish ineffective assistance of counsel). There would be no prejudice—either with respect to Johnson's ineffective assistance of counsel claim or with respect to the showing of prejudice necessary to excuse procedural default—if the government's interest in closure was so compelling that the closure at issue would have been ordered notwithstanding counsel's objection. However, in light of the compelling interest in a public trial and the rigorous test set forth in *Waller*, we are far from confident that the closure would have been implemented as suggested by the prosecution over Johnson's objections. Because the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed. *See Waller*, 467 U.S. at 50 n.9; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (citing *Waller* for the proposition that "violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove,

or a matter of chance'"). Consequently, if evidence reveals that counsel's failure to object fell below an objective standard of reasonableness, there is a strong likelihood that counsel's deficient performance would be deemed prejudicial.[7]

In sum, we are deeply concerned by the lack of attention afforded to Johnson's fundamental right to a public trial and conclude that further exploration of this issue is warranted.[8] On this record, it is virtually impossible to determine whether the closure of the trial was justifiable. Once further facts are available, the district court will be better equipped to determine whether closure of the trial was justified, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Johnson's public trial claim can be satisfied.

CONCLUSION

For the reasons stated above, we **VACATE** the district court's judgment denying habeas relief and **REMAND** for an evidentiary proceeding to determine whether the trial closure was justifiable, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Johnson's public trial claim can be satisfied.

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[7]As discussed in *Owens*, 483 F.3d at 64 n.13, Johnson must make two showings of prejudice. First, he must show that counsel's failure to object to the trial closure prejudiced him for purposes of determining whether there was ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Second, he must show prejudice to excuse his procedural default on the public trial claim. *Coleman*, 501 U.S. at 750. As was true in *Owens*, "[w]e believe that these showings of prejudice overlap , and we [address] them simultaneously." 483 F.3d at 64 n.13; *Cf. Strickler v. Greene*, 527 U.S. 263, 282 (1999) ("In this case, cause and prejudice [for procedural default] parallel two of the three components of the alleged [trial error] itself.")

[8]While defense counsel's objection triggers the trial court's duty to make factual findings under *Waller*, the court could have averted the issues presented in this appeal by conducting a detailed inquiry before agreeing to the prosecutor's request. The Supreme Court has made clear that trial closures infringe upon an important structural guarantee and that they should be rare. *Waller*, 467 U.S. at 45. Moreover, while First Amendment issues were not raised in this case, the public and the press also have a compelling First Amendment interest in a public trial. *See Press-Enterprise*, 464 U.S. at 509-10 ("[The] circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.") (internal quotation marks and citation omitted). Given the great, though intangible, societal loss that flows from closing courthouse doors, *Waller*, 467 U.S. at 50 n.9, a prudent court should carefully scrutinize a party's request before agreeing to close a courtroom.

DISSENT

KETHLEDGE, Circuit Judge, dissenting. In defending a murder charge, it is a bad idea, I think, to leave the judge with a smoldering suspicion that your client had a role in killing two of the prosecution's key witnesses before trial. A lawyer who minimizes that danger—by consenting to, rather than fighting, closure of the courtroom during the testimony of three surviving witnesses, out of a total of 18 testifying witnesses in the case—does not thereby render constitutionally ineffective assistance of counsel. That is all the more true, in my opinion, when there is not a shred of evidence that the closure had the slightest effect on the trial's outcome.

The majority concludes otherwise. The majority suggests that the closure fight here was one worth having—indeed, that it was constitutionally mandated—its ethereal upside and concrete downside notwithstanding. The majority then sidesteps the absence of any actual prejudice resulting from Johnson's consent to the closure—and with it, the plainly stated actual-prejudice requirement of *Strickland v. Washington*, 466 U.S. 668 (1984)—by holding that Johnson need not show any prejudice at all in support of his ineffective-assistance-of-counsel claim. That holding is not supported by "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which means that we are without power to impose it on the Michigan state courts in this habeas case. I respectfully dissent.

* * *

The majority and I agree that Johnson's habeas petition fails unless he can prove his ineffective-assistance-of-counsel claim. To prove that claim, Johnson must first show that his "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That showing requires, of course, proof that counsel committed errors in the first place. Second, Johnson "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. We review for an abuse of

discretion a district court's decision whether to hold an evidentiary hearing on these issues. *See Ivory v. Jackson*, 509 F.3d 284, 297 (6th Cir. 2007).

The district court did not abuse its discretion here, because Johnson's claim clearly fails on both grounds. First, prior to trial, two witnesses identified Johnson as the shooter in a barrage that left Carlos Davis dead, Larry Lewis and James Mathis wounded, and Robert Richards untouched by the bullets that Johnson fired toward him. Richards was unavailable to testify at trial—because he had been shot to death, in bed, after his testimony at Johnson's preliminary exam. Another prosecution witness, Elvin Robinson, was shot to death before he was able to testify at Johnson's exam. At trial, the prosecution moved to close the courtroom during the testimony of three surviving witnesses: Damon Ramsuer, who was the sole surviving witness to have identified Johnson as the shooter; and Lewis and Mathis, two of the persons Johnson shot. In support of its motion, the prosecution explained that all three witnesses were "literally terrified" and were "cowering, refusing to come to court, even under threat of being arrested, because they [were] afraid for their lives." Johnson's counsel chose not to pick this particular fight—truly a strategic decision if there ever was one—and, after consulting with Johnson, affirmatively agreed to the three-witness closure.

The question before us is whether that decision was so far outside the bounds of competent representation as to amount to constitutionally ineffective assistance of counsel. I do not think the decision can possibly be seen that way. Having reviewed the trial transcript, it seems to me instead that the decision was *correct*. Johnson's counsel essentially agreed to close the courtroom during the testimony of three witnesses, out of a total of 18 witnesses at trial. Strategically the net effect of that closure, as Johnson now describes it, was that several of his "female relatives" did not witness the testimony of those three witnesses. In return, Johnson's counsel deflected the trial judge from a line of inquiry—as to why, exactly, these three witnesses were so terrified to testify against Johnson—that almost certainly would have reflected poorly on his client. That avoidance appears all the wiser given that it emerged at Johnson's sentencing—and perhaps could have emerged sooner, had Johnson's counsel fought the closure—that

Richards was shot to death with ammunition from the same lot that Johnson used to kill Davis and wound Lewis and Mathis. The Constitution, suffice it to say, permitted this strategic choice.

Second, there is no evidence in the record—which includes the entire transcript of Johnson's trial—that Johnson's consent to closure as to three witnesses had any effect on the outcome of his murder trial. The majority does not assert the contrary. Instead, the majority holds, "[b]ecause the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed." Maj. Op. at 10. In so holding the majority drives right past the distinction between a *Waller* claim and a *Strickland* one. What the majority says is true enough for a *Waller* claim, but Johnson's petition undisputedly turns on a *Strickland* one; and *Strickland* repeatedly and unequivocally says that *actual prejudice* is required. *See, e.g.*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*") (emphasis added); *id.* at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding").

Reasonable jurists can disagree as to whether, when a defendant asserts an ineffective-assistance claim based on an underlying violation of his right to a public trial, the *Waller* definition of prejudice should trump the *Strickland* one, or vice versa. In a lengthy analysis of this very issue, the Eleventh Circuit held that the *Strickland* actual-prejudice requirement applies. *See Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006). (Our decision today directly conflicts with that decision.) The First Circuit has held that the *Waller* definition prevails, *see Owens v. United States*, 483 F.3d 48, 64-66 & n.14 (1st Cir. 2007)—although, critically, it did so in considering a challenge to an underlying *federal* conviction, *see* 28 U.S.C. § 2255, and thus was not limited, as we are here, to deciding whether "*clearly established* Federal law, as determined by the Supreme Court," requires that result. *Id.* § 2254(d)(1) (emphasis added). But I simply do not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an

actual-prejudice standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead.

What has been clearly established for decades is that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. Johnson has not touched that presumption here. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-1322

FILED
Nov 13, 2009
LEONARD GREEN, Clerk

WILLIAM JOHNSON,
Petitioner - Appellant,

v.

JERI ANN SHERRY, Warden,
Respondent - Appellee.

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court denying petitioner William Johnson's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is VACATED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM JOHNSON,

Petitioner, Case Number: 2:06-CV-11214

v. HON. BERNARD A. FRIEDMAN

JERI-ANN SHERRY,

Respondent.
_____/

OPINION AND ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner William Johnson, through counsel, has filed a petition for a writ of habeas corpus. Petitioner is currently incarcerated at the Chippewa Correctional Facility in Kincheloe, Michigan, pursuant to convictions for second-degree murder, three counts of assault with intent to commit murder, and possession of a firearm during the commission of a felony. For the reasons set forth below, the Court denies the petition.

II. Background

Petitioner's convictions arise from events that occurred outside a BHA Hall in Hamtramck, Michigan. The Michigan Court of Appeals summarized the facts as adduced at Petitioner's trial as follows:

> Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

> Richards told police that he saw the shooter, and he gave a detailed description of [the shooter's] clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.
>
> The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

Johnson, slip op. at 1.

III. Procedural History

Following a jury trial in Wayne County Circuit Court, Petitioner was convicted of second-degree murder, three counts of assault with intent to murder, and possession of a firearm during the commission of a felony. On February 13, 2003, Petitioner was sentenced to 35-60 years imprisonment for the murder conviction, 20-40 years imprisonment for each of the assault convictions, all to be served concurrently with one another and consecutively to two years imprisonment for the felony-firearm conviction.

Petitioner filed a motion for a new trial and for an evidentiary hearing. He requested an evidentiary hearing regarding his claims that he was denied his right to a public trial and that he was denied the effective assistance of counsel. The trial court denied Petitioner's motions. People v. Johnson, No. 02-012133-01 (Wayne County Circuit Court Sept. 30, 2003).

Petitioner filed an appeal of right in the Michigan Court of Appeals, raising the following claims:

> I. Where the court excluded the public including Appellant's family from the courtroom while three witnesses testified, was Appellant's constitutional right to a

public trial violated?

II. Did prosecutorial misconduct deny due process of law in the following ways:

a. The prosecutor's arguments denigrated defense counsel before the jury, thus diluting the presumption of innocence. The argument acted as a comment on his right to counsel, the right to the effective assistance of counsel, and the right to present a defense;

b. The prosecution's strategy introducing and arguing the element of fear before the jury constituted prosecutorial misconduct and denied Appellant a fair trial and due process of law; and

c. The prosecutor commented on the defendant's exercise of his right to remain silent and right not to testify and he shifted the burden of proof?

III. Was Appellant denied a fair trial when the trial judge told the jury over objection that the prosecution's only eyewitness was unavailable because he was deceased?

IV. Was Appellant denied the effective assistance of counsel in the following ways:

a. Defense counsel failed to object to the closing of the courtroom to the public;

b. Defense counsel's decision to call Janard Thomas and Letrulia Johnson as witnesses was an unreasonable strategy;

c. Defense counsel opened the door to testimony on fear;

d. Defense counsel failed to object to prosecutorial misconduct; and

e. Defense counsel failed to call an eyewitness whose testimony would have been exculpatory?

V. Did the trial court err in failing to hold a hearing on whether the out-of-court identification and the in-court identification were the result of an impermissibly suggestive procedure, where a group shot from the party was displayed to the eyewitness and the only person in the photo whose clothing matched the description of the perpetrator was the Appellant. Was Appellant also denied his right to counsel where the investigation had focused on but an attorney was not present at the identification procedure?

VI. Was Appellant denied due process of law and his right to a proportionate sentence where the court erred in the scoring of the guidelines and erred in its decision to

exceed the guidelines?

The Court of Appeals granted Petitioner's motion to file a supplemental brief, adding the following additional claim:

VII. Did the sentence imposed by the court violate Appellant's right to trial by jury, the right to due process of law, and the right to be free from excessive punishment?

The Michigan Court of Appeals affirmed Petitioner's convictions and sentences. People v. Johnson, No. 247227 (Mich. Ct. App. Aug. 24, 2004). Petitioner filed a motion for reconsideration on the ground that the trial court failed to address the issue raised in his supplemental brief. The court of appeals denied the motion for reconsideration. People v. Johnson, No. 247227 (Mich. Ct. App. Sept. 30, 2004).

Petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims raised before the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal because it was "not persuaded that the questions presented should be reviewed by this Court." People v. Johnson, No. 127293 (Mich. May 31, 2005).

Petitioner, through counsel, then filed the pending petition for a writ of habeas corpus, raising the following claims:

I. Where the court excluded the public including Petitioner's family from the courtroom while three prosecution witnesses testified, was Petitioner's constitutional right to a public trial violated?

II. Did prosecutorial misconduct deny Petitioner due process of law in the following ways:

a. The prosecution's strategy introducing and arguing the element of fear of the defendant was fundamentally unfair;

b. The prosecution's argument denigrated defense counsel before the jury thus diluting the presumption of innocence. The argument acted as a comment on his right to counsel, the right to the effective assistance, and

the right to present a defense;

c. The prosecutor commented on the defendant's exercise of his right to remain silent and right not to testify and he shifted the burden of proof?

III. Was Petitioner's right to a fair trial denied when the trial judge told the jury over objection that the prosecution's only eyewitness was unavailable because he was deceased?

IV. Was Petitioner denied the effective assistance of counsel in the following ways:

a. Defense counsel failed to object to the closing of the courtroom to the public;

b. Defense counsel's decision to call Janard Thomas and Letrulia Johnson as witnesses was an unreasonable strategy;

c. Defense counsel opened the door for testimony on fear;

d. Defense counsel failed to object to prosecutorial misconduct; and

e. Trial counsel failed to call an eyewitness whose testimony would have been exculpatory?

V. Did the trial court err in failing to hold a hearing on whether the out-of-court identification and the in-court identification were the result of an impermissibly suggestive procedure where a group photo taken at the party was displayed to the eyewitness and the only person in that photo whose clothing matched the description of the perpetrator was the Petitioner? Was Petitioner also denied his right to counsel where the investigation had focused on Petitioner but an attorney was not present at the identification procedure?

VI. Was Petitioner denied due process of law and was his right to a jury trial denied where his sentence was based on guideline factors not found by a jury to have been proven beyond a reasonable doubt?

IV. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[1]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000).

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[1] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

V. Analysis

A. Right to a Public Trial

Petitioner argues that his Sixth Amendment right to a public trial was violated when the trial court closed the courtroom to the public during the testimony of three prosecution witnesses. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right is applicable to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

"The central aim of a criminal proceeding must be to try the accused fairly." Waller v. Georgia, 467 U.S. 39, 46 (1984). The public-trial guarantee was created to further that aim. Id., *citing* Gannett Co. V. DePasquale, 443 U.S. 368, 380 (1979). A public trial helps to ensure that

judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. Id. The violation of the constitutional right to a public trial is a structural trial error, not subject to the harmless error analysis. Id. at 49-50, n.9.

A closure does not violate the Sixth Amendment where: (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced by an open courtroom; (2) the party seeking closure demonstrates that the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings adequate to support the closure. Id. at 48.

Respondent argues that this claim is procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, Coleman, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162;

Murray v. Carrier, 477 U.S. 478, 496 (1986).

A state procedural default is not an "independent and adequate state ground" barring subsequent federal review unless the state rule was "firmly established and regularly followed" at the time it was applied. Ford v. Georgia, 498 U.S. 411, 423-24 (1991). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." Simpson, 94 F.3d at 202.

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

This Court begins its analysis of whether Petitioner's claim is procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claim. *See* Coleman, 501 U.S. at 729-30. The last state court to issue a reasoned opinion addressing the allegedly procedurally defaulted claim was the Michigan Court of Appeals. The state court of appeals

held that because defense counsel did not object to the exclusion of spectators, the issue was not preserved for review. Johnson, slip op. at 2.

Petitioner argues that the state court of appeals' reliance on the contemporaneous-objection rule should not serve to default his claim because, at the time of Petitioner's trial, Michigan courts regularly addressed the merits of a claim on appellate review if the claim involved a "significant constitutional question." *See* Petitioner's Reply Brief at p. 3.

This Court recently addressed a similar claim of procedural default in the context of a claimed violation of the right to a public trial and held:

> While the contemporaneous objection rule is fairly established as a preferred procedure and appears to be regularly followed as to some claims, Michigan courts regularly waived contemporaneous objection defaults at the time of Petitioner's conviction when the issue was perceived to concern "constitutional due process rights." *See, e.g.*, People v. Crear, 242 Mich. App. 158, 166 (Mich. Ct. App. 2000); *see also* People v. Wilson, 230 Mich. App. 590, 593; People v. Johnson, 215 Mich. App. 658, 669 (Mich. Ct. App. 1996); Watson v. Watson, 204 Mich. App. 318, 319 (Mich. Ct. App. 1994). State procedural requirements which are not regularly followed cannot prevent federal review of alleged constitutional violations. Barr v. City of Columbia, 378 U.S. 146, 148 (1964). *Accord* James v. Kentucky, 466 U.S. 341, 348-49 (1984). "A rule of exception which itself depends on the perceived merits of the federal claim cannot fairly be considered 'adequate and independent' of federal law so as to preclude federal habeas review." Griffin v. Berghuis, 298 F. Supp. 2d 663, 672 (E.D. Mich. 2004), *quoting* Bentley, 239 F. Supp. 2d at 694.
>
> Petitioner's claim that her right to a public trial was violated unquestionably presented a significant constitutional question. Michigan courts regularly waived contemporaneous objection defaults in such circumstances. Accordingly, the Court finds that the state court's decision not to address this claim was not based upon a "firmly established and regularly followed" state procedural rule and, therefore, that the claim is not procedurally defaulted. Ford, 498 U.S. at 423-24. *Cf.* Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004) (holding that habeas petitioner had not waived right to a public trial by failing to object at trial because a right to a public trial is a fundamental trial right which may be relinquished only upon a showing that defendant knowingly and voluntarily waived such a right).

Salem v. Yukins, 414 F. Supp. 2d 687, 696-697 (E.D. Mich. 2006).

While the circumstances here are similar to those present in Salem, there is an important distinction between the two cases. In Salem, defense counsel clearly objected to the courtroom closure, but the state court held that her objection was not adequate to preserve the issue for appellate review. Thus, in Salem, whether or not defense counsel's objection was considered adequate to preserve the issue, there was no question that counsel did not acquiesce to the courtroom closure. Therefore, she did not waive the issue.

In contrast, in this case, Respondent's procedural default argument is not based upon defendant's failure to object, it is based upon his consent, through counsel, to the courtroom closure. Respondent argues that this acquiescence constituted a waiver of this claim. The Court finds that Petitioner waived his right to a public trial by his acquiescence, through his attorney, to the closure.

Moreover, even if this issue were not waived, Petitioner has failed to show that the state court's decision was contrary to or an unreasonable application of Waller. The state court, although finding that the claim was not preserved for appellate review, proceeded to address the merits of the claim for plain error. The state court applied the four requirements for courtroom closure articulated in Waller, and held, in pertinent part:

> Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989). The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent form the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in Kline restricts courtroom closures

> to circumstances involving very young witnesses or direct threats. We are satisfied that he suspicious deaths of two other witnesses were sufficient to jury concerns for the witnesses' safety.

Johnson, slip op. at 3.

The Court finds that the state court's conclusion was a reasonable application of Waller. While the trial court's findings could have been more clearly articulated on the record, it was, as observed by the Michigan Court of Appeals, a reasonable conclusion that the suspicious deaths of two witnesses had, in the trial court's opinion, sparked enough fear in three witnesses and sufficiently placed their well-being at risk to override Petitioner's right to a public trial. The trial court limited the closure to just three witnesses and ensured that the closure would not be evident to the jury. Considering these circumstances, the Court finds that the state court's application of the Waller factors was not unreasonable.

B. Alleged Prosecutorial Misconduct

Petitioner alleges that the prosecutor engaged in several acts of misconduct. Specifically, Petitioner argues that the prosecutor: (i) introduced the element of fear at the trial; (ii) denigrated defense and defense counsel; and (iii) commented on Petitioner's exercise of his right to remain silent, his right not to testify, and shifted the burden of proof to Petitioner.

Respondent argues that this claim is procedurally defaulted. "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." Hudson v. Jones, 351 F.3d 212, 215 (6th Cir. 2003); *citing* Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 1523 (1997). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." Lambrix, 520 U.S.

D. Alleged Ineffective Assistance of Counsel

Petitioner argues that his trial attorney was ineffective in the following ways: (i) failed to object to the closing of the courtroom to the public, (ii) erred in called witnesses Janard Thomas and Letrulia Johnson; (iii) opened the door for testimony on fear; (iv) failed to object to prosecutorial misconduct; and (v) failed to call an exculpatory eyewitness.

As an initial matter, Petitioner requests an evidentiary hearing on his claims of ineffective assistance of counsel. Petitioner appears to have been diligent in seeking an evidentiary hearing in state court. He filed a request for an evidentiary hearing in state court, which was denied. He also sought remand for an evidentiary hearing in both state appellate courts. Both state appellate courts denied his request for an evidentiary hearing. Even when a petitioner is diligent in requesting an evidentiary hearing, however, a federal court on habeas review is required to hold a hearing "only if the petitioner can demonstrate that (1) the grounds he alleges are sufficient to secure his release from custody, (2) relevant facts are in dispute, and (3) the state court did not provide a full and fair evidentiary hearing." Washington v. Renico, 455 F.3d 722, 731 n.4 (6th Cir. 2006). As discussed below, none of Petitioner's claims allege grounds sufficient to secure his release from custody. Accordingly, the Court finds an evidentiary hearing unnecessary.

To establish that he received ineffective assistance of counsel, a petitioner must show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner may show that counsel's performance was deficient by establishing that counsel's performance was "outside the wide range of professionally competent assistance." Id. at 689. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed by the Sixth Amendment." Id. at 687. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[T]he focus should be on whether the result of the trial was 'fundamentally unfair or unreliable.'" Tinsley v. Million, 399 F.3d 796, 802 (6th Cir. 2005), *quoting* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

1.

First, Petitioner alleges that his attorney was ineffective in failing to object to the closing of the courtroom to the public for the testimony of three witnesses. The Michigan Court of Appeals held that, because the closure of the courtroom was justified under the circumstances, counsel was not ineffective in failing to object to the closure. Johnson, slip op. at 7. As discussed above, this Court held that the decision to close the courtroom for a limited time was not an unreasonable application of Waller. Therefore, the Court finds that Petitioner has failed to establish that the failure to object to the closure fell "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 689.

2.

Petitioner argues that defense counsel erred in calling witnesses Janard Thomas and Letrulia Johnson because both witnesses provided damaging testimony. Both Thomas and Johnson testified that they observed Petitioner get hit in the back with a chair. Petitioner argues that this testimony ascribed a motive to Petitioner for the shooting.

The Michigan Court of Appeals held that counsel was not ineffective in calling these witnesses. The court observed that the testimony provided only "negligible" evidence of motive

and that their testimony provided some evidence favorable to the defense. Johnson, slip op. at 7.

The Court has reviewed Thomas's and Letrulia Johnson's testimony and finds that both witnesses gave exculpatory testimony. For example, Thomas testified that he and Petitioner helped each other from the club. Thomas was bleeding from a head wound. Petitioner drove him to Thomas's mother's home for help. Thomas testified that Petitioner was with him the entire time and that they left the scene before any gunshots were fired. Therefore, it was reasonable trial strategy for counsel to present a witness who testified that Petitioner was not the shooter.

Letrulia Johnson testified that she was at the club on the night of the shooting. When the fighting broke out, she and a female cousin headed to the door. She observed Petitioner, who is her cousin, being hit in the back with a chair and Thomas being hit on the head with a bottle. Letrulia Johnson and her female cousin then exited the building and walked to a vehicle. As they were trying to open the vehicle, they heard gunshots. Johnson's testimony corroborated Thomas's and was, therefore, useful for that purpose. The Michigan Court of Appeals' decision that trial counsel's decision to call Johnson and Thomas was not ineffective assistance is not contrary to or an unreasonable application of Strickland.

3.

Petitioner argues that his attorney was ineffective when he opened the door to testimony regarding a witness Damon Ramsuer's fear of testifying. As discussed in section V.B.1 above, Ramsuer's reluctance to testify became the subject of re-cross-examination after defense counsel opened the door to such testimony by asking Ramsuer the following question: "If you had seen

who fired shots that might have killed Carlos Davis, there's no reason for you not to have said that, was there?" Tr., Vol. II, p. 97. This question opened the door for the prosecutor to question Ramsuer regarding his reluctance to testify. Petitioner admits that "nothing damaging emerged on re-direct," but, nevertheless, argues that the prosecution's questions and reference to Ramsuer's reluctance to testify in closing argument prejudiced Petitioner because it implied that he had someone kill the witness Robert Richards and that Ramsuer feared the same would happen to him if he testified against Petitioner.

The Michigan Court of Appeals held that counsel's representation in this regard was not ineffective, stating, in pertinent part:

> By focusing on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

Johnson, slip op. at 8.

The Court finds that the court of appeals analysis was not contrary to or an unreasonable application of Strickland. As the state court observed, even absent defense counsel's question, the jury would have wondered why Ramsuer's testimony changed. Defense counsel's question gave Ramsuer an opportunity to tout the truthfulness of his trial testimony rather than his preliminary examination testimony. Defense counsel's attempt to put a positive spin on a

damaging witness was not ineffective.

4.

Petitioner next argues that his trial attorney was ineffective in failing to object to various instances of prosecutorial misconduct. This Court has determined that Petitioner has not shown that the prosecutor engaged in misconduct. Therefore, his attorney was not ineffective in failing to object to the prosecutor's conduct.

5.

Finally, Petitioner argues that counsel was ineffective in failing to call an exculpatory witness, Jason Hodgson.

The Michigan Court of Appeals held that the failure to call Hodgson did not prejudice the defense, reasoning, in pertinent part:

> Hodgson told the police that he was driving past the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs.
>
> Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was willing and able to testify at trial consistent with his statement. Consequently, he has failed to dhow either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

Johnson, slip op. at 8.

Given that some evidence was presented of two shooters and that Richards identified Petitioner as the shooter, Petitioner has failed to show that the state court's conclusion was

contrary to or an unreasonable application of Strickland. Moreover, given the testimony of Richards and Ramsuer's statement to police, Petitioner has failed to show a reasonable probability that the result of the proceeding would have been different had Hodgson been called as a witness.

E. Identification Procedure

Petitioner next argues that his right to due process was violated because the pretrial identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377 (1968). The identification at issue is that made by Robert Richards, the witness who was killed prior to trial. The trial court granted a motion for evidentiary hearing on this issue, but Richards was killed prior to the scheduled hearing.

"A conviction based on identification testimony that follows a pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994). A court must undertake a two-step analysis to determine the validity of a pretrial identification. First, the court must determine whether the procedure was unduly suggestive. If the court finds that the procedure was unduly suggestive, the court must then "evaluate the totality of the circumstances to determine whether the identification was nevertheless reliable." Id. Where an in-court identification was potentially impacted by an impermissibly suggestive out-of-court lineup, the governing test is whether "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Neil v. Biggers, 409 U.S. 188, 199

(1972).

Police Detective Szymanski obtained photographs of people taken at the party. On March 3, 2002, Detective Szymanski took the photographs to the hospitalized gunshot victims, Mathis and Lewis. After visiting his friend, Lewis, in the hospital, Robert Richards contacted Detective Szymanski and gave him a description of the clothing worn by the shooter. Richards subsequently went to the police station and viewed a group photograph containing men and women. He identified Petitioner as the shooter. Petitioner argues that, because the clothing worn by Petitioner in the photograph was similar to that described by Richards in his telephone call with Szymanski, the Detective should have added other photographs to the array containing men whose facial characteristics matched those of Petitioner. Petitioner maintains that the procedure used was equivalent to a one-man lineup.

The Michigan Court of Appeals denied Petitioner's claims, stating, in pertinent part:

> By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for purposes unrelated to a criminal investigation.
>
> The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if they have detained the correct person.
>
> * * *
>
> . . . The police used the photographs to determine which person from a large pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

> Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

Johnson, slip op. at 9-10.

The Court finds the Michigan Court of Appeals' analogy to an on-the-scene identification helpful. The Sixth Circuit Court of Appeals has recognized the value of show-up procedures, finding that conducting a showup is "consistent with legitimate law enforcement purposes," including allowing identification before a suspect has had the opportunity to alter his appearance. Drew v. Parker, 244 Fed. App'x 23, 28 (6th Cir. 2007). The Court concludes that the state court's determination that the identification procedure was not impermissibly suggestive was not contrary to or an unreasonable application of Supreme Court precedent.

Moreover, even assuming that the identification procedure was impermissibly suggestive, Petitioner has failed to show the identification at the preliminary examination was not reliable. Richards testified that he had the opportunity to see the shooter from twenty feet away, and that, although it was dark outside, the lighting was sufficient for him to discern many details of the shooter's clothing, including the color of his hat and type of shoes he wore. Considering all of these factors, this Court concludes that the state court's determination that the identification was reliable was not contrary to or an unreasonable application of Supreme Court precedent.

In addition, there is no constitutional right to counsel at a photographic array. Van v. Jones, 475 F.3d 292, 311 (6th Cir. 2007); United States v. Ash, 413 U.S. 300 (1973), . Therefore, Petitioner fails to assert a constitutional violation with respect to this claim.

F. Sentencing Claim

Finally, Petitioner argues that he is entitled to habeas corpus relief because the trial court increased his sentence in reliance upon facts not found by a jury in violation of the Sixth and Fourteenth Amendments. *See* Blakely v. Washington, 543 U.S. 296, 303-05 (2004) (state trial court's action in sentencing defendant beyond the statutory maximum of the standard range for his offense based upon judicial finding of deliberate cruelty violated Sixth Amendment right to trial by jury).

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Michigan has an indeterminate sentencing system for most crimes, including causing the death of another person while operating a motor vehicle under the influence of intoxicants. The maximum term of imprisonment is set by law. Mich. Comp. Laws § 769.8(1); *see also* People v. Drohan, 475 Mich. 140, 160-61 (2006). In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court addressed indeterminate sentencing systems and held that such systems do not violate the Sixth Amendment. The Court explained:

> [The Sixth Amendment] limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems

> important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 308-09.

Judicial factfinding may not be used to impose a sentence "beyond the prescribed statutory maximum." Apprendi, 530 U.S. at 490. Under Michigan law, the statutory maximum for second-degree murder, Mich. Comp. Laws § 750.317, and assault with intent to commit murder, Mich. Comp. Laws § 750.83, is life imprisonment. The sentencing court did not impose a sentence beyond the statutory maximum. Therefore, the sentencing scheme did not run afoul of the Sixth Amendment. Because Blakely does not apply to indeterminate sentencing schemes like the one utilized in Michigan, the trial court's sentence did not violate Petitioner's constitutional rights. *See* Tironi v. Birkett, No. 06-1557, 2007 WL 3226198, * 1 (6th Cir. Oct. 26, 2007). ("Blakely does not apply to Michigan's indeterminate sentencing scheme."). Minner v. Vasbinder, 2007 WL 1469419, * 4 (E.D. Mich. May 21, 2007); Chatman v. Lafler, 2007 WL 1308677, *2 (E.D. Mich. May 3, 2007); Jones v. Bergh, 2006 WL 1007602, *1-2 (E.D. Mich. April 17, 2006); George v. Burt, 2006 WL 156396, *5 (E.D. Mich. Jan. 20, 2006); Walton v. McKee, 2005 WL 1343060, *3 (E.D. Mich. June 1, 2005). Petitioner has thus failed to state a claim upon which habeas relief may be granted.

VI. Conclusion

For the reasons stated, Petitioner has failed to show that she is incarcerated in violation of

the Constitution or laws of the United States. Accordingly, **IT IS ORDERED** that the petition for a writ of habeas corpus is **DENIED**.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

Dated: February 12, 2008

I hereby certify that a copy of the foregoing document was served upon counsel of record by electronic and/or first-class mail.

s/Carol Mullins
Case Manager to Chief Judge Friedman

Order

Michigan Supreme Court
Lansing, Michigan

May 31, 2005

Clifford W. Taylor
Chief Justice

127293

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 127293
COA: 247227
Wayne CC: 02-012133-01

WILLIAM DESHUN JOHNSON,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the August 24, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

d0524

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 31, 2005 Corbin R. Davis

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DESHUN JOHNSON,

Defendant-Appellant.

UNPUBLISHED
August 24, 2004

No. 247227
Wayne Circuit Court
LC No. 02-012133-01

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 75.227b. He was sentenced to concurrent prison terms of thirty-five to sixty years for the murder conviction, and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

I

Defendant claims that the trial court violated his right to a public trial. We disagree.

At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

Because defense counsel did not object to the exclusion of spectators, this issue is not preserved and, therefore, is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* The plain error rule extends to unpreserved claims of both constitutional and nonconstitutional error. *Id.* at 764.

Both the federal and state constitution guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, the right to complain about an order of exclusion is waived where the defendant consents or fails to object. *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981); *People v Sylvester Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979). In the instant case, defendant expressly waived his right by assenting to the trial court's decision to close the courtroom during the three witnesses' testimony.

Moreover, the right to a public trial is not absolute, and, under certain circumstances, higher interests may take precedence. In *Kline*, *supra* at 169, this Court, quoting *Waller v Georgia*, 467 US 39, 45; 104 S Ct 2210; 81 L Ed 2d 31 (1984), and *Press-Enterprise Co v Superior Court of California, Riverside Co*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984), observed:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

The Court in *Kline* held that a trial court must satisfy four requirements before ordering a total closure.[1] These are:

> (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Waller, supra*], quoting *Press-Enterprise Co, supra*. [*Kline, supra* at 169.]

Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in *Kline* restricts courtroom closures to circumstances involving very young witnesses or direct threats. We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety.

Defendant also contends that his waiver was not knowingly or intelligently made because the trial court did not advise him of his rights. He analogizes to the requirements for accepting a defendant's waiver of the right to counsel or to a jury trial, and to the requirements surrounding guilty pleas. Defendant's argument is inconsistent with *Gratton, supra* at 478, wherein this Court held that the right to a public trial may be waived not only affirmatively, but also by a failure to object. Defendant cites no authority supporting his argument that a right to a public trial warrants the same safeguards as the right to counsel, a jury, or a trial, and therefore waives this argument. See *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

In sum, we conclude that the trial court did not plainly err when it ordered a brief closure of the trial to protect the safety of three witnesses. Further, defendant has not shown that the court's decision affected his substantial rights.

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[1] The *Kline* Court distinguished between total closures and partial closures, and noted that a partial closure requires a showing of only a substantial, rather than a compelling reason. *Id.* at 179, citing *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). Although the closure affected only three witnesses in the instant case, the fact that all spectators, including the defendant's family members, were excluded renders the closure total. See *Davis v Reynolds*, 890 F2d 1105, 1108-1110 (CA 10, 1989).

II

Defendant raises several claims of prosecutorial misconduct. A defendant must preserve his claim of prosecutorial misconduct by making a timely and specific objection. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Review of unpreserved claims of misconduct is limited to whether the alleged misconduct constituted plain error affecting the defendant's substantial rights. *Id.*

A

Defendant claims that the prosecutor denigrated his counsel's veracity by suggesting that defense counsel concocted defense witnesses' testimony. The prosecutor's argument referred to seven defense witnesses, mostly related to defendant, who testified that they were at the party with defendant, but who did not contact the police or come forward with their information until defense counsel contacted them shortly before trial. Trial counsel did not object to the prosecutor's argument, so our review is for plain error.

A prosecutor may not question a defense counsel's veracity, or suggest that defense counsel intentionally sought to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). The prosecutor may, however, point out the deficiencies in a defendant's case, and argue from the facts that a witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). The prosecutor's arguments here were not improper under these principles. The defense witnesses' failure to come forward sooner, following a violent event that led to serious criminal charges against a relative, cast doubt on their credibility and undermined the defense. Defendant has failed to establish plain error.

B

Defendant claims that the prosecutor repeatedly injected the element of fear in the trial; specifically, when: (1) he commented during opening statement that Richards was not available to testify, and that the jury would learn more about this during the trial; (2) he commented during closing argument that Lewis was still afraid; and (3) he suggested that Ramsuer changed his story and tried to avoid testifying because he was afraid. Prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999).

Defendant did not object to these specific incidents, but he moved before trial to preclude the prosecutor from questioning witnesses about their fear. The trial court agreed. Even if defendant's general objection can be viewed as sufficient to preserve his claims of prosecutorial misconduct, the challenged remarks did not deprive him of a fair and impartial trial. The remark about Richards' unavailability was too vague to suggest to jurors that Richards had been killed, or that his death was related to the trial. Only a person fully informed of the circumstances of Richards' death—and the jurors were not—could give the statement such an interpretation. The comment about Lewis' fear was based directly on Lewis' testimony that he still felt "mental pain to continue to relive this night over and over again for no reason at all." The prosecutor's remark

did not invoke the element of fear; the prosecutor merely observed that Lewis, like other victims of violent crimes, continued to feel anguish long after the event.

We also find no improper invocation of fear or emotion where the prosecutor asked the jury to "[t]hink about why [Ramsuer] wouldn't [identify defendant] in court" and to "[t]hink about the reasons why we had to lock him up to bring him to court to tell on his own friend, Mr. Davis, how he was murdered." Ramsuer was an important witness who denied making prior inculpatory statements or previously identifying defendant as the shooter. Asking the jurors to draw reasonable inferences as to why he would do so was highly relevant to the issue of whether Ramsuer's trial testimony was credible. The prosecutor's argument was not made to appeal to the jurors' emotions, nor did it ask the jurors to convict defendant for any reason other than that the evidence established his guilt.

C

Defendant claims that the prosecutor improperly shifted the burden of proof to the defense, and commented on defendant's right to remain silent, during the cross-examination of a defense witness, Janard Thomas, and again during closing argument. We review these claims for plain error, inasmuch as defendant did not object at trial.

The prosecutor may not comment on a defendant's failure to testify, because such an argument undermines the presumption of innocence and the defendant's right against compelled self-incrimination. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor also may not suggest that a defendant is obligated to prove something, because such an argument tends to shift the burden of proof. *Id.* at 113-115. However, the prosecutor may argue from the facts that a defendant's positions are not worthy of belief. *Howard, supra* at 548. Additionally, the prosecutor's arguments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Janard Thomas testified that he was hit in the head with a bottle, and defendant was hit in the back with a chair during the fight. Thomas claimed that defendant then helped him up from the floor, and the two fled from the hall and drove home. On cross-examination, the prosecutor questioned Thomas about his and defendant's failure to report the assaults to the police, though defendant might have been able to identify the person who hit Thomas. These questions did not implicate defendant's right to remain silent, but instead highlighted a weakness in Thomas' testimony.

Defendant also objects to the prosecutor's statement during closing argument that Richards' testimony about seeing defendant fire the gun repeatedly was uncontroverted. A prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Here, Richards' testimony was uncontroverted. Denise Chatman testified that she saw another person fire a gun, but she also testified that there seemed to be two shooters. Because persons other than defendant could have disputed Richards' testimony, but did not, the prosecutor's remark was proper.

Defendant's final claim of prosecutorial misconduct challenges the prosecutor's statement that there was no explanation for why defendant would possess a loaded magazine, but no gun. This was not a burden-shifting argument, but rather a comment on the evidence. The argument did not focus on defendant's failure to explain the evidence; instead, it implied that the evidence was inculpatory because a likely explanation was that defendant disposed of the gun.

In sum, the prosecutor did not make improper references to defendant's right to remain silent, or make improper attempts to shift the burden of proof in any of these alleged instances of misconduct. We therefore find no plain error.

III

Defendant argues that he was unfairly prejudiced when the trial court informed the jury that Richards' preliminary examination testimony would be read because Richards was deceased. Defendant opines that the jury must have realized that Richards was murdered, and inferred that his murder was connected to defendant's case. He argues that he was further prejudiced when Lewis stated, "My friends are dead," which could have signaled to the jury that defendant was involved in the murder of others, including Richards.[2] Defendant preserved this issue by twice requesting the trial court to indicate only that Richards was "unavailable." Because this issue is in the nature of an evidentiary issue, we review the trial court's decision for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

We find no abuse of discretion. When the trial court informed the jury that Richards was deceased, it also instructed the jurors "to make no inferences or draw any conclusions from that circumstance." Jurors are presumed to understand and follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the trial court's use of the innocuous term "deceased" in reference to Richards was not calculated to convey that his death was attributable to a homicide, or that it was connected to defendant. The statement did not allow the jury to infer that Richards likely was murdered, or that defendant was involved in his death. Similarly, Lewis' comment about his friends being dead was too fleeting and vague to be deemed prejudicial to defendant.

IV

Defendant raises several claims of ineffective assistance of counsel. Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *Rodriguez, supra* at 38. Here, defendant moved in the trial court for a *Ginther* hearing, but the trial court denied the motion.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have

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[2] Defendant unsuccessfully moved for a mistrial based on Lewis' statement. He does not challenge the denial of his request for a mistrial on appeal.

resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

A

First, defendant contends that counsel was deficient for agreeing to the closure of the courtroom during the testimony of three prosecution witnesses. As discussed in part I above, the trial court's decision to exclude spectators was justified under the circumstances. Accordingly, trial counsel's acquiescence was neither objectively unreasonable, nor outcome-determinative.

B

Next, defendant claims that trial counsel was deficient for calling Janard Thomas and Letrulia Johnson as defense witnesses. Thomas and Johnson both testified that they saw defendant get hit with a chair during the fight in the hall. Defendant maintains that this testimony helped the prosecution establish that defendant had a motive to shoot Lewis, Mathis, and Davis. Lewis had testified that he swung a folding chair at the crowd of people attacking Robinson, and that he carried the chair out of the hall with him for protection. The prosecutor asked during closing argument whether it was a coincidence that defendant shot the person who held the chair.

Defendant has not overcome the presumption that calling Thomas and Letrulia was sound trial strategy. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). All of the witnesses who described the fight portrayed the eruption as a donnybrook, in which numerous persons were pushed and hit with chairs and bottles. Letrulia testified that defendant was "down" after being hit with the chair, suggesting that he could not have left the hall in time to commit the shooting. Thomas' testimony indicated that defendant took Thomas home and helped dress a head wound he sustained when he was hit with a bottle. To the extent being hit by a chair could be viewed as a motive for this shooting, defendant was only one of several persons with that motive. Also, the jury could have inferred that defendant was struck during the fight even without the witnesses' testimony. Under these circumstances, Thomas' and Letrulia Johnson's testimony provided only negligible evidence of a motive, and their testimony cannot be characterized as only harming defendant's interests.

C

Defendant claims that trial counsel was ineffective because he opened the door to allowing the prosecutor to question Ramsuer about his fear of defendant. At the start of trial, defense counsel asked the trial court to preclude the prosecutor from questioning witnesses about their fear of defendant. The trial court agreed, unless the prosecutor could show some special need to explore a witness' fear. Subsequently, during defense counsel's cross-examination of Ramsuer, Ramsuer reiterated that he never told the police that he saw the shooter and never identified defendant as the shooter from the party photographs, notwithstanding the statement he signed. Defense counsel then elicited that Davis was Ramsuer's friend, and that Ramsuer had no reason not to reveal who killed his friend, if he knew.

The trial court agreed with the prosecutor that trial counsel's questions opened the door to allow the prosecutor to elicit testimony that Ramsuer was fearful of defendant. On redirect

examination, the prosecutor did not specifically question Ramsuer about his fear, but elicited Ramsuer's admission that he had no reason to lie to the police in the investigation of his friend's murder, and reviewed Ramsuer's subsequent lack of cooperation throughout the case.

By focusing only on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to the police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

D

Defendant claims that counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed in part II above. Because we have already concluded that none of these claims constituted plain error, counsel's failure to object did not constitute ineffective assistance.

E

Defendant contends that trial counsel was ineffective for failing to call Jason Hodgson to testify. Defendant raised this issue in his motion for a new trial. Hodgson told the police that he was driving past the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have a sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs.

Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was willing and able to testify at trial consistent with his statement. Consequently, he has failed to show either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

V

Defendant challenges the trial court's failure to hold an evidentiary hearing on his claim that the police used an impermissibly suggestive procedure when Richard identified him from a group photograph taken by a hired photographer during the party before the fight broke out. Defendant moved to suppress the identification, and for an evidentiary hearing on this claim.

Although the trial court did not believe that an evidentiary hearing was warranted, it agreed to hold a hearing and scheduled it for December 20, 2002. For reasons that are not clear from the record, the hearing was never held.

It is not necessary to determine why a hearing was never held, or to address the prosecution's claim that defendant effectively abandoned the issue by failing to renew his motion for a hearing. The record is sufficient to review this issue on the merits. The police officer's use of the photographs for identification purposes did not trigger concerns about unduly suggestive procedures.

An unduly suggestive identification procedure that is conducive to "irreparable misidentification" constitutes a denial of due process. *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993); *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness identifies a defendant through an impermissibly suggestive identification procedure, evidence concerning the identification is inadmissible at trial unless an independent basis for an in-court identification can be established "that is untainted by the suggestive pretrial procedure." *Kurylczyk*, *supra* at 303; *Williams*, *supra* at 542-543. Our Supreme Court stated in *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998):

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness is told or believes that the police have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *Id.*

In *Gray*, the Court further emphasized that "the exhibition of a single photograph 'is one of the most suggestive photographic identification procedures that can be used.'" *Id.*, quoting Sobel, *Eyewitness Identification* (2d ed), § 5.3(f), p 5-42.

The use of the party photographs in the instant case did not trigger the suggestiveness concerns in *Gray* and *Kurylczyk*. By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for purposes unrelated to a criminal investigation.

The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if they have detained the correct person. This Court stated in *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997):

> Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether

> there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. . . . Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability. [Citations omitted.]

In *People v Libbett*, 251 Mich App 353, 360-363; 650 NW2d 407 (2002), this Court approved an on-the-scene identification, despite a two-hour lapse between the crime and the identification, where there "was nothing in the record to suggest that the police made any suggestive comments at the identification or that the police were acting for reasons other than to determine 'whether there [was] a reasonable likelihood that the suspect [was] connected with the crime and subject to arrest, or merely an unfortunate victim of circumstances.'" *Id.*, quoting *Winters*, *supra* at 728.

The use of the party photographs in the instant case do not precisely fit the on-the-scene identification scenario of *Winters* and *Libbett*, but the analysis in these cases is apt nonetheless. The police used the photographs to determine which person from a large pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

VI

Defendant challenges the sentencing court's scoring of the sentencing guidelines, and its decision to exceed the guidelines by forty-five months with respect to his sentence for second-degree murder.

Defendant objected to the sentencing court's scoring of offense variables 4, 5 and 9 at sentencing; therefore, these issues are preserved. MCL 769.34(10); MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable (OV) 4, psychological injury to a victim, assigns a score of ten points where the victim sustains "[s]erious psychological injury requiring professional treatment."

MCL 777.34(1)(a). The sentencing court is directed to score ten points "if the serious psychological injury may require professional treatment," but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Defendant received ten points for this variable. We conclude that the evidence supported the score of ten points because Lewis testified that he was still suffering "mental pain" and continued "to relive this night over and over again."

OV 5 assigns fifteen points where the victim's family member suffers "[s]erious psychological injury requiring professional treatment." MCL 777.35(1)(a). As with OV 4, the fact that treatment has not been sought is not conclusive. MCL 777.35(2). Ruby Davis, Davis' "adopted aunt," stated at the sentencing hearing that Davis' mother and other family members were "a nervous wreck" and unable to go about their everyday lives. His mother was taking medication, she could not sleep, and she was afraid to leave the house. This evidence was sufficient to support a score of fifteen points for OV 5.

The sentencing court scored twenty-five points for OV 9, number of victims, which is appropriate where there are ten or more victims. MCL 777.39(b). Each person who is placed in danger of injury or loss of life is considered a victim for purposes of scoring this variable. MCL 777.39(2)(b). The sentencing court reasoned that defendant randomly fired into a crowd of at least ten people, all of whom could be considered victims of the assault. We agree that the evidence was sufficient to support the trial court's score. Several witnesses testified that there were at least one hundred persons in the hall, and that most of them exited the hall during the fight. This would have placed most of them outside the hall at the time of the shooting. It is reasonable to infer, as the sentencing court did, that the randomness of the shooting placed all of them in danger of injury, and thus they were victims of the shooting spree.

The guidelines minimum sentence range for defendant's second-degree murder conviction was 225 to 375 months or life in prison. The sentencing court commented, however, that the guidelines did not "look at and score the impact of that kind of offense where someone shoots other persons in this particular way." The court explained:

> Here, I think that what bothers me about this case and so many that I see like this, and you know this happens all the time: Someone is upset, angered because of something that happened; and they want to take the ultimate revenge in that for whatever reason, whether it be bad judgment or just wanting to establish one's self in terms of what their reputation may be, whatever it may be.

The sentencing court commented that defendant shot randomly into a large crowd out of anger after being hit with a chair in the brawl, and killed a person who had done nothing to victimize defendant. The court asserted that these circumstances warranted an upward departure from the guidelines, and sentenced defendant to thirty-five to sixty years in prison for second-degree murder. The minimum sentence exceeded the guidelines by three years and nine months.

MCL 769.34 requires a sentencing court to sentence a defendant within the guidelines range, but allows for departures from the guidelines for substantial and compelling reasons. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich App 247, 255; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing court must articulate its reasons for the departure on the record, and its reasons must be "objective and verifiable." MCL 769.34(3); *Babcock, supra* at 257-259. The sentencing court may not base a

departure on a factor already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the record that the factor has been given inadequate or disproportionate weight. *Id.* at 258 n 12. Departures from the guidelines are appropriate where a sentence within the guidelines range is not proportionate to the seriousness of the offense. *Id.* at 264. The determination whether a particular factor is objective and verifiable is reviewed as a matter of law, whereas the determination that objective and verifiable factors constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 264-265.

We find no error in the court's upward departure. In explaining why a departure from the guidelines was warranted, the court stated that the guidelines did not account for the depravity displayed by defendant's conduct of unleashing deadly force against an entire crowd of people merely because he was angry that one person had hit him with a chair. Contrary to defendant's argument, these circumstances were not adequately accounted for by the guidelines. Neither OV 9, multiple victims, nor OV 6, intent to kill, adequately addressed the circumstance of defendant avenging a comparatively minor incident with a shooting spree against dozens of persons. This reason is also objective and verifiable, and consistent with the evidence. The court did not abuse its discretion in determining that these circumstances presented a substantial and compelling reason to depart from the guidelines. *Id.* at 264.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad

But right now I am inclined to just merely say that he is deceased, and they're not worry about it in any kind of way, and leave it at that. Okay?

MR. MORAN: So the record is made.

THE COURT: Okay.

MR. MORAN: Thank you, your Honor.

THE COURT: Anything else?

MR. MORAN: One other point. And I've never done this in ten years of practicing law.

I'm asking the Court at certain times to have no spectators in the courtroom, other than the defense attorney and the Defendant and a few security and the prosecutor and the police.

Because there are several witnesses who are afraid to testify. There are several witnesses who refuse to come to court. In addition,

THE COURT: Mr. Moran you're treading on some very dangerous ground.

MR. MORAN: I know. And I apologize, your Honor. I want to make a record for this. Because in addition to Mr. Richards being murdered in his bed, before the preliminary examination on Mr. Elvin Robinson -- he was murdered as well. He was a witness at the scene. He was scheduled to do a preliminary examination on a charge of assault to commit murder.

He was murdered in his car outside of a bar prior to his testimony of the preliminary exam. So he's one witness who was murdered.

We have a second witness who was murdered in his bed after he testified. So there are two witnesses who were killed under very suspicious grounds.

There are a number of civilian witnesses who are afraid to show their face in the courtroom because they're just scared. And I know this is very thin ground, your Honor. I know the Defendant has a right to confrontation,

THE COURT: That's not denying right to confrontation, I guess, if you don't have any spectators in the courtroom. Because denying confrontation would be with the persons, if we were concerned in denying him to see and be before the persons who are doing the testifying. So I don't think we're necessarily denying that. Trials are supposed to be public --

MR. MORAN: Right.

THE COURT: -- and so forth, so it has to be --

MR. MORAN: The only case law I really found deals with small children. When small children are intimidated by someone present in those cases, they do it by closed circuit TV sometimes.

I talked to Mr. Fishman about this. I'm sure he has an objection to it. But just the level of paranoia from

the witnesses is not unfounded. To have two witnesses murdered prior to testifying or after testifying is unprecedented in my experience.

And the witnesses are literally terrified. One witness we transported out of state. We set up a residence out of state.

There are witnesses who are cowering, refusing to come to court, even under threat of being arrested, because they are afraid for their lives.

So I would ask as a precautionary measure, just for a couple of civilian witnesses,

THE COURT: Well, if these persons are essentially being protected -- they are away -- what is their concern about?

I mean, I guess at some point they have to get on with their lives and be back out there. But prior to them -- I mean, after they testify, what is of concern at this time?

MR. MORAN: Right now the concern is that no one has seen their face, because a lot of witnesses did not appear. There are two witnesses that testified at the preliminary exam.

There were three or four witnesses who failed to appear at the preliminary exam. There are three or four witnesses who refused to come to court because they don't

want their face to be seen.

So I'm asking just for a couple witnesses, probably three.

MR. FISHMAN: Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since Mr. Moran brought it to my attention.

If the Court wants to do that, we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem.

THE COURT: Right. I understand. Yes, like I say, when you start getting all these little things coming into this, you get a compilation of concerns that are put before the jury.

Let's do it this way: when the one or two persons that you are talking about, that I would assume whatever way you're bringing them into the courtroom here -- from the back or whatever it may be or through the sheriff's office, however that may be -- give me notice.

Because, see, I don't want to have the jurors in the courtroom and say, Okay, everybody out of the courtroom, you know, that kind of thing.

MR. MORAN: Yes, your Honor.

MR. FISHMAN: See, I have a huge objection to that obviously.

THE COURT: Sure. Just so we know in advance, we can control it. Because if it's not before the jury, and there is no issue been put before them to see that, you know, they can't hopefully make any kind of assumptions about that. Just so we make sure.

MR. FISHMAN: But now there's another subject comes to mind. I keep thinking of Mr. Gordon's case. One of the reasons it was eventually reversed -- this business about fair.

We're not going to go into that on the witness stand, are we? Because that's what I'm telling you -- I'll bring you the 6th Circuit opinion -- because that's where we're going to be.

THE COURT: Yeah, that's --

MR. MORAN: We can't try the case about fair.

THE COURT: I agree with that. Now, I don't want you asking the witnesses, you know, Are you afraid to be here? or whatever else, you know, that might be.

And unless you can show some specific need for something like that; then, no, I agree with you on that.

MR. FISEMAN: I understand.

MR. MORAN: Thank you, your Honor.

TRE COURT: Anything else right now?

Detroit, Michigan

January 7, 2003

At or about 9:47 a.m.

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THE COURT: Go ahead. The record should reflect that we are on record. The jury is not in the courtroom. Go ahead, please.

MR. MORAN: Good morning, your Honor. May it please the Court, Robert Moran, Assistant Prosecutor. I thank the Court. There is one issue I would like to bring before the Court; that is the issue of one of our witnesses last night at about seven o'clock -- we detained a witness that the Court had issued a detainer on. His name is Damon Ramsuer.

A detainer was issued by this Court several weeks ago because we had difficulty locating Mr. Ramsuer. Mr. Ramsuer was served for the preliminary exam. He did not appear.

To make a long story short, we had a very difficult time locating him. I was under the impression that he would not be located. In any event, he is here.

I've had a chance to speak to him this morning. He indicates that his testimony is going to be somewhat different than his Statement that he gave to Sergeant Mason from the Detroit Police Department.

Sergeant Mason is not on the witness list. However, if the witness testifies differently than what is in his Statement, I would be seeking to amend the witness list and add the name of Sergeant Mason to impeach the witness, because there are some things in the Statement that might be relevant.

THE COURT: Your response to that, Mr. Fishman?

MR. FISHMAN: I don't have a response, Judge.

THE COURT: Very well. We'll do that then if it becomes necessary. If there's a need for Mr. Fishman to -- well, he has the Statement; right? You have a copy of the Statement; right?

MR. FISHMAN: I do.

THE COURT: All right. We'll see how it plays out.

MR. MORAN: Yes, sir. Thank you.

THE COURT: About ready? Where are we right now? How are we proceeding right now?

MR. MORAN: There are three civilians witnesses that are here that I asked the courtroom be closed yesterday.

THE COURT: Are you ready to move with those?

MR. MORAN: I'm going to move with those, and then we're done.

THE COURT: Okay. I should say for the record, the reason why we got a late start here is that for some reason,

the persons over there at the jail did not have people ready to go.

The reason that was given, basically, I was told, is that some people on the night shift, who are responsible for doing that, didn't show up for work yesterday. But anyway, that's the reason.

MR. FISHMAN: That's what I heard as well, by the way.

All of the people from our family have been told to come around eleven o'clock. And I told them if they came and we were still in here, that they're just going to sit outside. So --

THE COURT: Very well. I appreciate both of your cooperation in this. I appreciate that very much. Okay. Let's move on. Go ahead and bring them in, Calvin.

OFFICER OF THE COURT: All rise.

(At 9:49 a.m. jury enters courtroom)

OFFICER OF THE COURT: You may be seated.

THE COURT: We stand for you. Okay? So you may be seated. Okay. I'm sorry. I didn't tell you about that. Thank you. Everyone may be seated, please.

So let the lawyers recognize that the jurors are in the courtroom, please.

I apologize. I mentioned to you yesterday that there was a possibility of some matters to take care of

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

Case No. 02-012133
Hon. Thomas E. Jackson

WILLIAM JOHNSON,

Defendant.
_____/

AFFIDAVIT OF CELESTINE CUNNINGHAM

COUNTY OF WAYNE)
)ss
STATE OF MICHIGAN)

Celestine Cunningham, being first duly sworn, deposes and states that

1. She is William Johnson's great aunt on his mother's side.

2. She is 47 years old. She has lived in Detroit all of her life and has no criminal record.

3. She attended the trial of her grandnephew William Johnson in January of 2003.

4. On the first day of trial, she was told by trial counsel not to come the next day until 11:00am or noon.

5. As instructed, she arrived the for the second day of trial after 11:00am.

6. Attending the trial every day with her were the following relatives of Mr. Johnson:

Gwendolyn Brumfield
Lakeesha Ricks
Valerie Thomas
Linda Johnson

7. The above four people were also told not to arrive at court before 11:00am on the second day of trial.

Further deponent saith not.

Celestine Cunningham
CELESTINE CUNNINHAM

Subscribed and sworn to before me
this 24th day of July, 2003.

Notary Public Wayne County, Michigan
My commission expires:

KATRINA CARMICHAEL
NOTARY PUBLIC - MICHIGAN
WAYNE COUNTY
MY COMMISSION EXPIRES AUG. 24, 2008

No. 09-1342

In The
Supreme Court Of The United States

JERI-ANN SHERRY, Warden,

Petitioner,

-vs-

WILLIAM D. JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

ELIZABETH L. JACOBS
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QUESTIONS PRESENTED

I. Should a petition for a writ of certiorari be granted, where the Sixth Circuit's decision rests on clearly established Supreme Court law and where there is no conflict among the Circuits on the need to show prejudice from a full closure of the court room?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The Petitioner is Jeri Ann Sherry, Warden of a Michigan correctional facility. The Respondent is William Johnson, an inmate.

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The Sixth Circuit Court of Appeals denied a petition for rehearing en banc. Apx 1a. The opinion of the Court of Appeals is published at 586 F3d 439 (6th Cir, 2009). Apx 2a. The Opinion and Order of the United States District Court denying the petition is unpublished. Apx 18a.

The Michigan Supreme Court denied leave in an unpublished order. Apx 41a. The decision of the Michigan Court of Appeals affirming Johnson's conviction is unpublished. Apx 42a.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction. Jurisdiction is based on 28 USC 1254(1). See also 28 USC 2101(C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Closure of the court room occurred at trial during the testimony of the three main witnesses against Respondent. The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...

The Sixth Amendment also provides that

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The statute involved is 28 USC 2254(d) which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Subsection (e) of the statute accords the presumption of correctness to State court factual determinations. That subsection reads in pertinent parts as follows:

> (1) ... a determination of a factual issue made by a State court shall be presumed to

be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

COUNTER STATEMENT OF FACTS

William Johnson was convicted by a jury of the second degree murder in the death of Carlos Davis, assault with intent to commit murder on Robert Richards, assault with intent to commit murder on James Mathis, assault with intent to commit murder on Larry Lewis, and possession of a firearm during the commission of a felony.

THE CRIME

The crimes occurred in the early morning hours of March 3, 2002, in front of the BHA Hall on Caniff Street in the city of Hamtramck. A melee broke out inside the BHA Hall on Caniff in the city of Hamtramck, Michigan. One person, Elvin Robinson, was stabbed. Someone other than Petitioner was charged in that murder. Before he was to testify at the preliminary examination of this other defendant, he was killed. Elvin Robinson was not a witness against the Respondent.

As people were streaming out of the hall to get away from the melee, shots were fired outside the Hall. In that incident which is the res of this case, Carlos Davis, was killed; Larry Lewis and James Mathis were shot but survived, and Robert Richards although he did not suffer any gunshot wounds was also a complainant on an assault with intent to commit murder charge. Richards testified against the petitioner at the preliminary examination identifying him as the shooter.

Two days after the party, Robert Richards called the police from Larry Lewis' hospital room (Trial, January 7, 2003 II-160) and gave a detailed clothing description of the person he claimed to have seen standing in the parking lot and shooting at his friends. The description was of a black male wearing a baseball hat, black jacket with a car logo on the back, blue jeans with blue timberlane shoes. Trial, January 7, 2003 II-243-245; 248-249. His description did not include height, weight, body build, or distinguishing features. It was only a clothing description. Trial, January 7, 2003 II-163. The police displayed a photo, People's Exhibit #38, to him which had been taken the night of the party. It was a group shot of the Respondent and approximately 5 of his female cousins and 3-4 male cousins. Trial, January 8, 2003 III-45). Mr. Richards identified the appellant in that picture as the shooter. Trial, January 7, 2003 II-248. Mr. Richards testified at the preliminary examination but

was killed shortly thereafter. His testimony was read to the jury at trial.

CLOSURE

On the first day of trial, the prosecution asked that the trial be closed during the testimony of certain witnesses. The defense counsel said that if that's what the court wants to do, he had no objection as long as the jurors did not see the public being excluded from the courtroom. The judge agreed to that procedure. Apx 54a-58a.

On the second day of trial, the prosecution alerted the judge that closure should begin for the first three witnesses of the day. The court excluded everyone from the court room except for the jury, the attorneys, the officer in charge and Mr. Johnson. Defense counsel stated that he had informed the defendant's family not to come to court until 11:00am and to stay outside of the court room when they arrived if the court was in session. Apx 59a-61a.

The court was closed for the testimony of three main prosecution witnesses: James Mathis, a complainant; Larry Lewis, a chair-swinging complainant; and Damon Ramsuer, a non-complainant eye witness.

The family members who attended on the first day and had expected to observe the complete trial of their relative but were excluded on the morning of the second day were Celestine Cunningham, maternal great aunt, 47 years old; Gwendolyn Brumfield, maternal aunt, 50 years old; Lakeesha Ricks, first cousin, 38 years old; Valerie Thomas, aunt, 47 years old; Linda Johnson, aunt 43 years old. Apx 62a-63a.

In a post-conviction motion for new trial, the defense raised the issues of the denial of the right to a public trial and also defense counsel's failure to object to the denial. Respondent requested hearings on both issues. The request was denied.

DIRECT REVIEW

The Michigan Court of Appeals in a per curiam opinion affirmed the convictions. Apx 42a. The Michigan Supreme Court denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. Apx 41a.

HABEAS REVIEW

Mr. Johnson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. On February 12, 2008, the district court judge denied the petition. Apx 18a.

On November 13, 2009, the United States Court of Appeals for the Sixth Circuit vacated the decision of the district court and remanded the matter for a hearing on whether the closure was justified, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Respondent's public trial claim can be satisfied. Apx 12a.

On January 28, 2010, the Court denied a motion for rehearing en banc. Apx 1a.

Other facts will be referred to in the body of the arguments and are incorporated into this Statement by reference

REASONS FOR DENYING THE WRIT

The petition for certiorari filed in this case should be denied because it does not meet the "compelling reasons" standard found in Supreme Court Rule (SCR) 10. That rule offers a non-exclusive list of reasons that would earn the adjective "compelling". In this case, the Petitioner contends that the compelling reasons are that there is a conflict in the Circuits on the issue the prejudice prong of the *Strickland*[1] test when analyzing trial counsel's failure to object to closure of the court and that the Sixth Circuit's decision did not rest on clearly established Supreme Court precedent. However as will be shown there is no conflict and the Sixth Circuit's decision rests on clearly established Supreme Court law.

A. There is clearly established Supreme Court precedent that where there has been full closure of the courtroom, prejudice is presumed. This presumption fulfills the prejudice requirement of the *Strickland* test where counsel failed to object to closure.

1. The Right To A Public Trial

> In all criminal prosecutions, the accused shall enjoy a speedy and public trial...

Am VI, US Const.

The principle that justice cannot survive behind walls of silence is reflected in the Anglo-American distrust for secret trials. *In Re Oliver*, 333 US 257, 268 (1948). More recently, Judge Damon Keith observed that "[d]emocracies die behind closed doors. *Detroit Free Press v Ashcroft*, 303 F3d 681, 683 (6th Cir, 2002).

The Sixth Amendment to the United States Constitution guarantees to the accused in every criminal proceeding the right to a public trial. The right was applied to the states via the 14th Amendment due process clause. *Duncan v Louisiana*, 391 US 145, 148 (1968). This right is for the protection of the accused. *Estes v State of Texas*, 381 US 532, 538 (1965). That this right belongs to the accused was reaffirmed in *Gannett Co, Inc. v DePasquale*, 443 US 368, 380 (1979).

---

1 *Strickland v Washington*, 466 US 668 (1984).

One of the earliest opportunities for the Court to analyze the right to a public trial occurred in a Michigan case. In *In re Oliver, supra*, a man was secretly tried and sentenced for contempt of a one-man grand jury. The Court reviewed the historical underpinnings of the right, but could not find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor did it find any record of even one such secret criminal trial in England since the abolition of the Court of Star Chamber in 1641.

In tracing the origin of the right to a public trial in the common law, the *Oliver* Court stated

> This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country, the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, ... most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

Id. 266-267.

In overturning the contempt conviction, the Court identified three important functions that this right serves. First, it is a safeguard against government persecution:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Id. at p 270. Second, public trials discourage perjury:

> In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Id. at p 270 fn 24. This further preserves the integrity of the judicial system in the eyes of the public. Third, it protects citizens from irresponsible jurors.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions * * *"

Id. at p 270 fn 25.

The Court also expressed a special concern for the presence of the defendant's friends and relatives:

> And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.

Id. at pp 271-272.

2. The Waller Test

The right to public trial is not absolute but yields in certain rare incidents.

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co. v Superior Court of California, 464 US 501, 510 (1984).

In *Waller v Georgia,* 467 US 39, 45 (1984), the Court held that instances where the right to a public trial would give way to other overriding interests would be rare and balancing the interests must be done with special care. It adopted the following four-part test:

> 1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
>
> 2) the closure must be no broader than necessary to protect that interest;
>
> 3) the trial court must consider reasonable alternatives to closing the hearing; and
>
> 4) it must make findings adequate to support the closure.

This unanimous *Waller* decision extended the right to a public trial to pre-trial proceedings. Recently, this Court, in a per curiam opinion, acknowledged that the right extends to the voir dire. *Presley v Georgia,* 130 S Ct 721 (2010). A violation was found where the public was excluded from the announcement of a verdict in a bench trial. *United States v Canady,* 126 F3d 352, 364 (2nd Cir, 1997),

As indicated in *Oliver*, the Courts recognize a special concern where the defendant's family and friends are excluded. *Bell v Jarvis*, 198 F3d 432, 437-42 (4th Cir, 1999)(Violation found where all but family and friends of the complainant were excluded from court); *Guzman v Scully*, 80 F3d

772, 773-77 (2nd Cir, 1996)(Habeas relief granted where the court excluded 4 spectators two of whom, women, were either friends or relative of the defendant from the cross-examination of a prosecution witness); *Vidal v Williams*, 31 F3d 67, 69 (2nd Cir, 1994)(Writ granted where Defendant's parents were excluded from the testimony of one police officer, a writ was granted).

From these cases, it is evident, first, that the right to a public trial encompasses all proceedings associated with the trial of a case and second, even where there is an overriding or compelling need for closure, exclusion of defendant's friends or relations implicates Sixth Amendment concerns.

3. Application of Law to Facts

In applying the *Waller* test to the facts of this case, Respondent easily demonstrates that his right to a public trial was denied.

a. There was no overriding interest which justified the closure of the court.

Under the first Waller factor, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. In the instant case, closure was full[2] so the prosecution had the burden to show an overriding or compelling interest that would be prejudiced by a public trial. It also had to be specific. *Id* at 48[3].

In requesting closure, the prosecution acknowledged that he had never requested closure before. He pointed out that a witness had been murdered, and that the complainant from another incident occurring that evening but not involving defendant, had been murdered. He added that some witnesses were scared to come to court. But there was no offer of proof as to which witnesses were scared or if any witness had been threatened. There was similarly no proof that anyone in the

---

2 Partial closure refers to the practice of allowing some members of the public to remain in the courtroom, while full closure means the exclusion of all members of the public.

3 The trial court's findings of fact must also be specific to enable appellate review. *Waller*, 467 US at 45. No specific findings were made by the trial court. Trial, January 6, 2003 I 135-139, Apx 54a-58a and Trial, January 7, 2003, II 5-6 Apx 59a-61a..

defendant's family had ever threatened the witnesses or in fact was involved in the death of Robert Richards, let alone Elvin Robinson.[4] The prosecutor even conceded that the support for his motion was thin. Apx 54a-58a. The prosecution failed to make the required specific showing.

The Court was closed during the testimony of Damon Ramsuer, James Mathis, and Larry Lewis, the most important witnesses in the case.[5] The latter two were complainants. Damon Ramsuer was not a complainant albeit he was an eyewitness. Although in a statement signed by Mr. Ramsuer, he identified the defendant as the shooter, he did not identify him at trial and he denied ever making any identification. He also testified at trial that there was no reason for him not to say who killed his friend. (Trial Transcript Vol. II-97). Larry Lewis testified at the preliminary examination, but he never identified anyone in any statement, at the examination or at trial. James Mathis was also a complainant. He never identified anyone as the shooter. No facts were offered to show that these witnesses were threatened by the jailed defendant or by his relatives or by his friends. Nor did the witnesses, themselves express fear for their safety. Thus there was no compelling reason for any closure let alone a full closure with its infringement on the defendant's right to a public trial. Compare to *Woods v Kuhlmann*, 977 F2d 74, 76 (2nd Cir, 1992), where an overriding interest justifying closure was based on the fact that the witness was the only eyewitness, and that defendant's family had threatened the witness in the past.

b. The concerns of the prosecution could be met by less than full closure.

Under the second prong in which the closure must be no broader than necessary to protect

---

4 The dissent judge in the Sixth Circuit mistakenly stated that Elvin Robinson was killed before testifying at Respondent's preliminary examination. Apx 14a. Mr. Robinson was killed before testifying at the examination in the case in which he was a complainant. He was neither a witness nor a complainant in the case at bar.

5 The other prosecution witnesses were either expert witnesses, officers who responded to the scene and civilians who observed the initial chair-swinging incident inside the club. A prosecution witness offered after the defense rested, a woman, testified to observing the shooting and to a description of the shooter(s). The Court was not closed for her testimony.

the interest, the scale weighs again in favor of Respondent. Since there was no compelling interest, closure should not have been allowed. Even if this Court found that there was a compelling interest there was still no evidence which would support the closure of the court to the defendant's family members three middle-aged female aunts and one 38-year old female first cousin. Statement of the Case p. 5; Apx 62a-63a. There was no evidence that defendant's middle-aged female relatives were a danger to the safety of the witnesses, or that they knew who they were before testifying, nor that they even knew where the witnesses lived. Under *In Re Oliver, supra*, the Supreme Court expressed a special concern for the defendant's family and friends and in fact has never applied the *Waller* test to a state court's exclusion of family members. Both the Second and the Eleventh Circuit have also applied a more rigorous review where family was excluded. *Yung v Walker*, 341 F3d 104, 110 (2nd Cir, 2003); *Vidal v Williams, supra*; *Judd v Haley*, 250 F3d 1308, 1315 (11th Cir, 2001).

In the case at bar, Respondent's family should have been allowed to stay. The state court's decision on the second prong of the *Waller* test was clearly unreasonable and contrary to supreme court precedent.

c. The trial court did not consider reasonable alternatives to full closure.

Under the third *Waller* factor, the trial court failed to consider reasonable alternatives to closing the trial, such as allowing Mr. Johnson's family to remain. The Michigan Court of Appeals held that the defendant did not propose an alternative way to protect the witnesses safety and so this factor weighed against him. Apx 44a. This was contrary to the holding in *Waller*. It is up to the court to fashion less restrictive means so it can protect the defendant's right to a public trial. The defendant has no burden under the *Waller* test. The *Presley* Court also found that trial courts must consider alternatives to closure "even when they are not offered by the parties." It noted that this "is clear not only from this Court's precedents but also from the premise that '[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" 130 S Ct at 724 quoting from *Press-Enterprise Co. v Superior Court*, 464 US 501, 505 (1984).

d. The Court did not make findings adequate to support the closure.

The fourth *Waller* factor requires the court to make findings adequate to support the closure. The Court cautioned that the findings may not be broad and general. *Waller* at 45. The findings must be specific. *Waller* at 48. Here, the trial court knew it was on dangerous grounds. Apx 54a. This was also reflected in the fact that its findings are almost non existent and certainly not adequate to support the closure. It never knew which witnesses claimed to be frightened and never knew if any witnesses had been threatened. It never knew what family members were being excluded. No attempt was even made by the court to discover these facts.

The appellate Court's decision was contrary to the requirements of *Waller* which was specific in requiring findings adequate to support closure. As an example of the kind of record that should be made before witnesses may testify in secret, the Second Circuit in a case where the court was closed to family during an undercover officer's testimony, pointed out the following:

> Applying the fourth *Waller* prong, the district court reasoned that, before Yung's family could be excluded from the courtroom, the state court was required to make findings with respect to the likelihood of an encounter between the undercover officer and the family members in question or the family members' inclination to harm the undercover officer.

Yung, supra at 111. The *Yung* Court stated that the proper test was not a sufficiency of the evidence test but rather whether the presumptively correct findings were adequate to support closure. But in the instant case, this test is irrelevant because there are no findings to presume to be correct. So on these last two prongs of the *Waller* test, the state court, again unreasonably applied *Waller* and its decision was contrary to the decision in *Waller*. Apx 43a-44a.

The Michigan Court of Appeals relied on two decisions that were not on point with the case at bar. These two cases were *People v Kline*, 197 Mich App 165, 170-171, 494 NW2d 756 (1992) and *Nieto v Sullivan*, 879 F2d 743, 753 (10th Cir, 1989). (Apx 44a). Both of them were partial closure cases in that some people remained in the court room after it was closed. In *Kline*, a couple of people waiting for another case were excepted from closure and in *Nieto* only defendant's relatives were excluded. The Michigan appellate court's reliance on *Nieto* and *Kline* was misplaced and shows

that its analysis of this issue was clearly unreasonable under *Waller, Duncan,* and *Oliver*. It was also contrary to the decisions in those cases. In fact under the *Oliver* case, relatives may not be excluded.

The fact that the State court analyzed the facts of the case as a partial closure rather than a full closure rebuts the presumption of correctness that would otherwise be accorded to its factual determinations under 28 USC 2254(e)(1).

6. The Presumption of Prejudice and the Strickland Test.

Where there has been full closure, that is that the public has been completely excluded from the court room, a specific showing of prejudice is not required. *Waller*, 467 US at 49-50. Once the denial of the right is established, reversal is automatic because this is a structural defect in the trial mechanism itself. *Arizona v Fulminante*, 499 US 279, 310 (1991). In *Neder v United States*, 527 US 1, 7 (1999), the Court again held that the denial of the right to a public trial is a structural error and noted that "errors of this type are so intrinsically harmful as to require automatic reversal." The reason for this rule is that the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance. The violation of the right is not subject to a harmless error review. *Waller, supra* p. 49 n9; *United States v Gonzalez-Lopez*, 548 US 140, 150 fn 4 (2006). If the defendant was required to show prejudice, it would make this right one in name only. *Carson v Fischer*, 421 F3d 83, 95 (2nd Cir, 2005)(Rejecting harmless error analysis); *United States v Canady*, 126 F3d 352, 364 (2nd Cir, 1997)(if the denial of the right to a public trial was not a structural defect and thus subject to a harmless error analysis, the violation would almost always be held to be harmless).

While Respondent acknowledges that the test for ineffective assistance of counsel usually requires a showing of prejudice, Supreme Court cases hold that instances where it is impossible to measure it, such a showing is not required. This was shown above in the right to a public trial. The requirement is waived where there has been an actual or constructive denial of the right to counsel. *Strickland v Washington*, 466 US 668, 692 (1984). The Court also waives the requirement where counsel has an actual conflicting interest. *Cuyler v Sullivan*, 446 US 335 (1980). It is also waived in assistance of counsel cases where the prosecution is directly responsible or it would have been easy

for the prosecution to prevent it. *Purvis v Crosby*, 451 F3d 734, 740 (11th Cir. 2006) quoting *United States v Cronic*, 466 US 648, 104 S Ct 2039, 2067 (1984). Thus there is precedent to waive the requirement in cases of ineffective assistance of counsel.

There is no requirement that "clearly established" Supreme Court law for 28 USC 2254 purposes is only that which is explicitly stated in the form of a rule. It includes not only bright-line rules but the legal principles and standards flowing from precedent. *Taylor v Withrow*, 288 F3d 846, 852 (6th Cir, 2002). Clearly established law refers to the holdings as opposed to the dicta of the Supreme Court's decisions as of the time of the relevant state court decision. *Williams v Taylor*, 529 US 362, 412 (2000). The law is the "governing legal principle or principles set forth by the Supreme Court..." *Lockyer v Andrade*, 538 US 63, 71-72 (2003). Moreover the *Williams* Court stated that under 28 USC 2254 it would be unreasonable for a state court to refuse to extend a rule to a new context where it applies. *Williams v Taylor*, supra at 407.

Because the right to a public trial is of such pre-eminent value in our criminal justice system, even where neither party asserts the right, it is error to exclude the public. *Presley, supra* at 724-725. See also *Press-Enterprise Co. v Superior Court, supra* at 503-504, 513, albeit the violation in that latter case was brought as a First Amendment challenge. The former case involved a Sixth Amendment violation. This right is so paramount, yet the prejudicial effect of the violation is not easy to measure. Courts also excuse a showing of prejudice where the right has been violated because the benefits of the right are intangible. To require a defendant to do on the second prong of *Strickland* that which it has already found impossible to prove is objectively unreasonable.

The Michigan Court of Appeals did not discuss this issue. It merely concluded that it was not outcome determinative. Apx 48a.

Petitioner relies on two cases to argue that the Sixth Circuit cannot excuse a showing of prejudice. These case are *Davis v Secretary for the Department of Corrections*, 411 US 233 (1973) and *Francis v Henderson*, 425 US 536 (1976). However neither *Davis* nor *Henderson* concerned errors which at the time of their decisions were considered structural defects in the framework of the

trial. They both involved the absence of African-Americans from the grand jury which returned the indictments. It was not until the decision in *Rose v Mitchell,* 443 US 545 (1979), that this Court recognized that a harmless error analysis should not apply to discrimination in the selection of grand jurors, three years after the decision in *Henderson* and six years after the decision in *Davis*. And in both cases, there were specific procedural rules requiring objections to any errors in the institution of the proceeding to be made before trial. FRCrP 12(b); La.Code Crim.Proc.Ann. Art. 535(B)(3).

In the instant case, the Sixth Circuit's opinion rests on clearly established Supreme Court law.

B. There is no conflict in the circuits on the issue of whether full closure requires a showing of prejudice under *Strickland* where trial counsel failed to object to the closure.

Petitioner contends that there is a conflict in the Circuits as to whether prejudice must be shown. It points to *Owens v United States*, 483 F3d 48 (1st Cir. 2007) along with the instant case which found that an unjustified full closure of the court was a structural defect in the trial mechanism excusing a showing of prejudice on the second *Strickland* prong where trial counsel failed to object versus *Purvis v Crosby*, 451 F3d 734 (11th Cir. 2006), finding that a defendant must make a showing that he was prejudiced at trial by counsel's failure to object to closure. However, since *Purvis* was a partial closure case and since the Eleventh Circuit found that a partial closure is a defect merely in the proceedings not in the framework of the trial, there is no conflict. While the *Purvis* Court does discuss structural defects and the prejudice requirement, this exegesis was not necessary for its decision. Before that discussion, the Eleventh Circuit had decided the case based on a partial closure:

> If counsel had objected in a timely fashion and persuaded the trial judge not to partially close the courtroom, there is no reason to believe that would have changed the victim's testimony in a way that would have created a reasonable doubt in the jury's mind. (Emphasis added).

Id. at 738-739.

The Petitioner has not shown a compelling reason for the grant of the petition. Nor has it shown that the Sixth Circuit Court of Appeals improperly applied the standard found at 28 USC

2254(d). The petition should be denied.

CONCLUSION

The decision of the Michigan Court of Appeals was based on an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States in *Waller v Georgia* and *Strickland v Washington*, and 28 USC 2254 (d). It is contrary to clearly established federal law as determined by the Supreme Court of the United States in the above cases. 28 USC 2254 (d)(1). It also resulted in decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 USC 2254 (d)(2). This Court should deny the petition for certiorari because the Sixth Circuit Court of Appeals correctly applied the standards delineated in 28 USC 2254(d) and because there is no conflict among the Circuits.

The petition for a writ of certiorari should be denied and the decision of the Sixth Circuit Court of Appeals should be affirmed.

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DATED: June 28, 2010

No. 09-1342

In The

Supreme Court of the United States

JERI-ANN SHERRY

Petitioner,

v.

WILLIAM D. JOHNSON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

As noted in the original petition, the defense counsel here agreed to the closure of the courtroom for three frightened witnesses where two other witnesses had been murdered during the pendency of the case. The U.S. Court of Appeals for the Sixth Circuit determined that prejudice is presumed under *Waller v. Georgia* if the State trial court would not have closed the courtroom in the absence of the agreement of William Johnson's counsel.

But this case came to the Sixth Circuit in habeas corpus review. And there is no clearly established Supreme Court precedent that the courts should presume prejudice for ineffective assistance of counsel for agreeing to the courtroom's closure, a structural error if the courtroom was improperly closed. Thus, the State court decision to reject Johnson's ineffective assistance of counsel claim was not objectively unreasonable under 28 U.S.C. § 2254(d).

The primary error of Johnson's brief in opposition is failing to recognize that this Court has not previously addressed this issue. Rather, examined as a defaulted claim of structural error, this Court rejected a claim for relief in *Francis v. Henderson*. Moreover, this Court did not list structural error as one of the excuses for a habeas petitioner to avoid having to prove cause and prejudice in *Coleman v. Thompson*. Consequently, it is an open question in this Court whether the action of agreeing to or failing to object to the closure – if ineffective assistance – would require the presumption of prejudice. In fact, there is good basis on which to apply the prejudice prong of *Strickland v. Washington*. Otherwise, as several courts

have noted, a defense counsel may embed structural error in the trial as an appellate parachute.

The other significant error of Johnson's brief in opposition is in its effort to reconcile this decision and *Owens v. United States* from the First Circuit with *Purvis v. Crosby* from the Eleventh Circuit. Johnson contends that *Purvis* is distinguishable because it examined a partial closure, not a total one as here. But the Eleventh Circuit in *Purvis* predicated its analysis on the allegation of error being structural in nature. Also, other circuits have noted the same point about the requirement of proving cause and prejudice to overcome a procedural default even where the defaulted error was a structural one. These decisions are in conflict with the one here.

The final error of Johnson's brief is his factual claim that one of the persons murdered – Elvin Robinson – was not a witness in this case. Johnson's claim is contradicted by the record and the decisions of all of the lower courts. Without contradiction, the prosecution noted that Robinson was a witness "at the scene" who was later murdered. Johnson has not overcome the presumed correctness of this fact.

ARGUMENT

I. There is no clearly established Supreme Court precedent that requires a court to presume prejudice for an allegation of deficient performance in agreeing to close the courtroom.

This Court has not resolved the question about whether an attorney's deficient performance for a claim about one's right to a public trial under the Sixth Amendment excuses a criminal defendant's burden of proving prejudice. This is true whether the issue is examined as one in a habeas corpus proceeding in attempting to avoid a procedural default by demonstrating cause and prejudice or examined as one in which a criminal defendant must prove prejudice under *Strickland v. Washington* on direct review.[1] This is a significant legal issue.

The Sixth Circuit decision here examined the issue both as one of a procedural default and as a question whether proof of ineffective assistance required an independent showing of prejudice. In resolving these two points, the Sixth Circuit determined that "if the closure were unjustified or broader than necessary, prejudice would be presumed." Pet. App. 17a-18a. Thus, the Sixth Circuit determined that there is no necessary showing of prejudice for a procedural default and for ineffective assistance where the underlying error is a structural error (agreeing to the closure of the courtroom).

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

A. This Court has not previously required the presumption of prejudice where there was ineffective assistance or the claim was defaulted.

Johnson's claim in his brief in opposition that clearly established Supreme Court precedent supports his position (p. 14) is insensitive to the posture of the case. This Court in *Waller* has recognized that a preserved claim of a violation of the right to public trial under the Sixth Amendment would not require a showing of prejudice as a structural error.[2] But there was no objection to the closure of the courtroom here. Rather, as even the Sixth Circuit conceded, Johnson's counsel agreed ("acquiesc[ed]") to the closure of the courtroom. Pet. App. 16a. This Court has not resolved whether such a claim of error – where the claim was waived by counsel – would allow for the presumption of prejudice to excuse the procedural bar or to establish ineffective assistance of counsel.

Johnson asserts that this Court has recognized an exception to the *Strickland* prejudice requirement. In *Mickens v. Taylor*, however, this Court noted that "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation."[3] As a general matter, a defendant alleging a

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[2] *Waller v. Georgia*, 467 U.S. 39, 49 (1984). This Court did note that under the First Amendment "[t]he public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721, 724-725 (2010), citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 503-504 (1984).

[3] *Mickens v. Taylor*, 535 U.S. 162, 166-167 (2002) (citation and internal quotes omitted).

Sixth Amendment violation must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mickens* recognized only two exceptions to the requirement that prejudice be shown: (1) where assistance of counsel has been denied entirely or during a critical stage of the proceedings, and (2) when the defendant's attorney actively represented conflicting interests. The Court has never presumed *Strickland* prejudice in any other circumstance. By creating a third category of *Strickland* claims where prejudice is presumed – where counsel fails to object to a structural error – the Sixth Circuit created a new constitutional rule instead of confining itself to clearly established Supreme Court law as required by § 2254(d).

The only case in which this Court has addressed the issue whether a structural error nevertheless requires proof of prejudice was in *Francis v. Henderson*.[4] In *Francis*, the claim of error related to an attorney's failure to object to a process by which African American jurors were excluded from the grand jury. This Court determined that to avoid the application of a default in habeas, the criminal defendant would have to prove "actual prejudice."[5]

In response, Johnson notes in his brief in opposition (p. 15) that the *Francis* decision, and the decision on which it relied, *Davis v. United States*,[6] both preceded this Court's ruling in *Rose v. Mitchell* in

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[4] *Francis v. Henderson*, 425 U.S. 536 (1976).

[5] *Francis*, 425 U.S. at 542.

[6] *Davis v. United States*, 411 U.S. 233 (1973).

which this Court rejected the claim that "habeas corpus relief should be granted only where the error alleged in support of that relief affected the determination of guilt."[7]

The decision in *Rose*, however, only reaffirmed a long standing position from this Court that a conviction could not stand where there was discrimination in the process of selecting the grand jury. In *Vasquez v. Hillery*, this Court indicated that in rejecting harmless-error analysis, the Court was only refusing to "reconsider[]" this line of precedent:

> [T]he Court has repeatedly rejected all arguments that conviction may stand despite racial discrimination in the selection of the grand jury. *See, e. g.*, [list of cases]. Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law should be *reconsidered* in favor of a harmless-error standard, and determined that it should not. *Rose v. Mitchell*, 443 U.S. 545 (1979).[8]

The suggestion, therefore, is that the rule was already in place at the time of the decision in *Francis*.

Furthermore, the subsequent decision in *Rose* does not affect the status of *Francis* because this Court expressly distinguished it, noting that there was no claim in *Rose* that the claim was procedurally

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[7] *Rose v. Mitchell*, 443 U.S. 545, 560 (1979).

[8] *Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (emphasis added).

defaulted.[9] If anything, the Court's analysis reaffirms the holding in *Francis*. The only logical inference available here is that *Francis* remains good law and that a defaulted claim would still require the habeas petitioner to prove prejudice to overcome the default as in *Francis*.

This Court's later decision in *Coleman v. Thompson* further supports the conclusion that a structural error does not excuse the burden of proving prejudice to avoid a procedural default.[10] In *Coleman*, this Court expressly stated that where a claim was procedurally defaulted in state court, a habeas petitioner was required to prove cause and prejudice to overcome this default.[11] The only exception identified by this Court was for a "fundamental miscarriage of justice" in which the conviction has probably resulted in a conviction of an actually innocent person.[12] There was no exception included for structural errors. Several circuits have noted this very point in determining that a defaulted claim that is predicated on an allegation of a structural error does not alleviate the habeas petitioner's burden of proving prejudice.[13]

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[9] *Rose*, 443 U.S. at 559 n. 8.

[10] *Coleman v. Thompson*, 501 U.S. 722 (1991).

[11] *Coleman*, 501 U.S. at 750.

[12] *Coleman*, 501 U.S. at 750.

[13] *See, e.g., Ward v. Hinsley*, 377 F.3d 719, 725 (7th Cir. 2004); *Hatcher v. Hopkins*, 256 F.3d 761, 764 (8th Cir. 2001).

B. There is a good basis on which to require a criminal defendant to prove prejudice for the error at issue here.

This Court has stated that a criminal defendant may in some circumstances waive his right to a public trial.[14] This would be a strange rule if a criminal defendant in that circumstance could then on appeal allege ineffective assistance of counsel for that waiver and ensure a new trial because prejudice would be presumed from that allegation of error.

Indeed, this Court has addressed on direct review a claim of a violation of a right to a public trial where there was no objection. In *Levine v. United States*, a criminal defendant was testifying at a grand jury proceeding and refused to testify even after the courtroom had been cleared.[15] The trial court then held the defendant in criminal contempt and sentenced him to one year in prison – when the public was not present. This Court held that the criminal defendant could not then complain on appeal for the first time:

> Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an

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[14] *Singer v. United States*, 380 U.S. 24, 35 (1965).

[15] *Levine v. United States*, 362 U.S. 610, 619 (1960).

> abstract claim only as an afterthought on appeal.[16]

As noted by one of the lower courts, the Court treated the failure to object here as a waiver of the claim.[17]

One of the main reasons that requiring proof of prejudice makes sense is that it forecloses gamesmanship. This was the reason that the Utah Supreme Court determined that the excusal of the burden of proving prejudice would create an incentive for a defense counsel to embed error in the trial:

> We decline to do away with the requirement of a showing of prejudice for an ineffective assistance of counsel claim. Were we to hold otherwise, defense counsel could freely refrain from objecting to an improper closure order and then, if the verdict is adverse, raise the issue on appeal for the first time under the rubric of an ineffective assistance of counsel claim. Absent a prejudice requirement, a retrial would be automatic. We decline to adopt a rule that would encourage such manipulation.[18]

The Seventh Circuit identified similar concerns – characterizing it as "sandbagging" – in addressing the same point in the habeas context for proof of cause and prejudice.[19]

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[16] *Levine*, 362 U.S. at 619-620.

[17] *See United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006).

[18] *Utah v. Butterfield*, 784 P.2d 153, 157 (Utah 1989).

[19] *Ward*, 377 F.3d at 726.

II. There is a conflict of circuits on this issue.

Johnson argues that there is no conflict between the circuits, because the case relied on by the State, *Purvis v. Crosby*, only involved a partial closure of the courtroom.[20] As noted in the petition (p. 21), however, the Court predicated its analysis on the assumption that the error was a structural one.[21] The issue was squarely framed as here:

> If a partial closure of the courtroom like this is a structural error or defect--*and we are assuming for this discussion that it is*--the question is whether a habeas petitioner must show prejudice in order to prevail on a claim that his trial counsel was ineffective for failing to object to the closure.[22]

The issue was framed the same way in this case.

Moreover, the decision here also conflicts with the two circuits that reasoned it would be necessary to prove cause and prejudice to overcome a procedural default even where that error that related to a structural error.

In *Ward v. Hinsley*, the Seventh Circuit held that a claim was barred by procedural default even where the error was alleged to rise to the level of a structural error.[23] The Seventh Circuit reasoned that

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[20] *Purvis v. Crosby*, 451 F.3d 734 (11th Cir. 2006).

[21] *Purvis*, 451 F.3d at 740.

[22] *Purvis*, 451 F.3d at 740.

[23] *Ward*, 377 F.3d at 726.

the considerations of comity and federalism require the application of the procedural default doctrine. [24] The claim by Johnson was procedurally defaulted here, and the Sixth Circuit examined the ineffective assistance of counsel claim together with the issue whether cause and prejudice excused the default. Pet. App. 13a-14a.

Likewise, in *Hatcher v. Hopkins*, the Eighth Circuit determined that there is no case law that excuses a procedural default for a claim of a structural error. The circuit rejected the habeas petitioner's reliance on *Arizona v. Fulminante*, stating that it was "incorrect" that "federal courts may review structural errors even though they have been procedurally defaulted in the state courts."[25]

The case from the Second Circuit relied on by Johnson, *Carson v. Fischer*, further confirms the split. In *Carson*, the Second Circuit held that a habeas petitioner was not required to prove harmless error under *Strickland* where a family member or a friend had been excluded from the courtroom.[26] Significantly, in *Rodriguez v. Miller* in which the Sixth Amendment right to a public trial was at issue in habeas, the Second Circuit stated that it could no longer rely on *Carson*.[27] This Court had vacated and remanded *Rodriguez* in light of its decision in *Musladin v. Carey*.[28]

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[24] *Ward*, 377 F.3d at 726 (citations omitted).

[25] *Hatcher*, 256 F.3d at 764, citing *Arizona v. Fulminante*, 499 U.S. 279 (1991).

[26] *Carson v. Fischer*, 421 F.3d 83, 95 (2d Cir. 2005).

[27] *See Rodriguez v. Miller*, 537 F.3d 102, 109 (2d Cir. 2007).

[28] *Rodriguez*, 537 F.3d at 109, on remand in light of *Casey v. Musladin*, 549 U.S. 70 (2006).

III. Johnson's assertion that Elvin Robinson was not a witness in this case is belied by the record.

In his brief in opposition (pp. 8-13), Johnson addresses whether the courtroom closure was proper under *Waller*, an issue not implicated by the petition's question. In this analysis, however, Johnson asserts that Robinson – who was murdered during the pendency of the case against Johnson – was not a witness in the Johnson case. This is wrong. The prosecution stated this point in its motion to close the courtroom, this point was accepted in the State courts, and was accepted below. The fact that Robinson was a witness here was well established and has not been rebutted. See 28 U.S.C. § 2254(e)(1).

As noted in the petition, the prosecution moved to close the courtroom because two witnesses had been murdered during the pendency of the case. The prosecution identified Robinson as a witness on the "scene" in this case. Res. App. 54a. Johnson contends that Robinson was a victim to a different crime (p. 9), but this was a related case from the same set of circumstances. The same indictment charged Johnson's codefendant with the crime of assault with intent to murder against Robinson. Trial, Vol. III, pp. 6-8.

In its order denying Johnson's motion for a new trial, the State trial court noted that "[j]ust prior to the trial two key prosecution witnesses had been murdered." Order denying motion for new trial, September 30, 2003, p. 1. The Michigan Court of Appeals likewise found that "two other witnesses had been killed under suspicious circumstances." Pet. App.

71a. These findings are presumptively correct. The federal lower courts likewise did not dispute these points. Pet. App. 10a ("the prosecutor had informed the court that two witnesses had been killed"); Pet. App. 43a (referring to "suspicious deaths of two witnesses").

The suggestion that the fear here was not substantial is belied by the record. The prosecution noted that these murders had frightened the other witnesses and compromised the ability of the prosecution to bring its witnesses to trial:

> There are three or four witnesses who refused to come to court because they don't want their face to be seen. [Res. App. 56a-57a.]

The Sixth Circuit did not fully appreciate the significance of the danger to the witnesses in stating that "we are far from convinced that this was the 'rare' circumstance where closure was justified." Pet. App. 15a.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

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